No. 93-826

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BERMAN ENTERPRISES, INC.; GENERAL MARINE TRANSPORT CORPORATION; STANDARD MARINE SERVICES, INC.; JANE FRANK KRESCH, as Secretary of Berman Enterprises; EVELYN BERMAN FRANK, as Chief Executive Officer of General Marine Transport Corporation and as an Officer of the other named corporations; and PETER M. FRANK, as President of General Marine Transport Corporation,

Petitioners,

—v.—

THOMAS C. JORLING, in his individual capacity and in his official capacity as Commissioner of the New York State Department of Environmental Conservation; and LANGDON MARSH, in his individual capacity and in his official capacity as Executive Deputy Commissioner of the New York State Department of Environmental Conservation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 19, 1993

QUESTIONS PRESENTED

1. Whether a federal court should abstain from decision under the *Pullman* doctrine in a civil rights action brought pursuant to 42 U.S.C. § 1983 where the actions of the state officials are preempted by federal law?

2. Whether a federal court should abstain from decision under the *Pullman* doctrine in a civil rights action pursuant to 42 U.S.C. § 1983 where the state statute at issue is unambiguous?

3. Whether a federal court should abstain from decision under the *Burford* doctrine in a civil rights action pursuant to 42 U.S.C. § 1983 where no interference with a state statutory scheme is implicated?

4. Whether a federal court should defer rather than dismiss under the *Pullman* abstention doctrine a federal civil rights action pursuant to 42 U.S.C. § 1983 where claims for prospective injunctive relief and declaratory relief will not be resolved by the state court determination?

5. Whether the standard for qualified immunity of state officials from personal damage claims pursuant to 42 U.S.C. § 1983 is that the state official reasonably should have known that his actions violated the constitutional rights of the claimant?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 LISTS

Petitioners (plaintiffs) are three corporations: Berman Enterprises, Inc., General Marine Transport Corporation and Standard Marine Services, Inc. and three individuals in their capacities as officers of the corporations: Jane Frank Kresch, Evelyn Berman Frank and Peter M. Frank. Respondents (defendants) are two individuals: Thomas C. Jorling and Langdon Marsh, both in their individual capacities and in their official capacities as Commissioner of the New York State Department of Environmental Conservation and Executive Deputy Commissioner of the Department of Environmental Conservation, respectively.

Rule 29.1 List of Petitioner Berman Enterprises, Inc.

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Petitioner Berman Enterprises, Inc. submits the following list. Berman Enterprises, Inc. has the following affiliates and subsidiaries: Standard Marine Services, Inc.

Rule 29.1 List of Petitioner General Marine Transport Corporation

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Petitioner General Marine Transport Corporation submits the following list. General Marine Transport Corporation has the following affiliates and subsidiaries: Standard Marine Services, Inc.

Rule 29.1 List of Petitioner Standard Marine Services, Inc.

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Petitioner Standard Marine Services, Inc. submits the following list. Standard Marine Services, Inc. has the following affiliates and subsidiaries: Bayonne Properties, Inc.; Standard Tank Cleaning Corp.; Standard Tank Cleaning Co.; Berman Enterprises, Inc; Marine Movements, Inc.; Barge Operations, Inc.; Mercury Tank Cleaning Corp.; Water Facilities, Inc.; Waterways Towing, Inc.; General Marine Transport Corporation; Sludge Tank Cleaning Co. Inc.; Standard Marine Transport Services, Inc; New England Marine Services, Inc.; Parklane Marine Transport Corp.; Park Lane Associates; Standard Marine Bunkering Services, Inc. (renamed Bunker Group New York, Inc.); Virginia Tank Logistics, Inc.; Standard Marine Towing Services, Inc. and Bunker Group, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Berman Enterprises, Inc., General Marine Transport Corporation, Standard Marine Services, Inc., Jane Frank Kresch, Evelyn Berman Frank and Peter M. Frank respectfully request that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit entered on August 24, 1993. The Second Circuit Court affirmed the decision of the United States District Court for the Eastern District of New York which granted respondents' motion to dismiss petitioners' amended complaint on the basis of qualified immunity and abstention.

Opinions Below

The opinion of the Second Circuit Court of Appeals is reported at 3 F.3d 602 (2d Cir. 1993) and is reproduced in Appendix A. (1a).[1] The opinion of the District Court for the Eastern District of New York is reported at 793 F.Supp. 602 (E.D.N.Y. 1992) and is reproduced in Appendix B. (14a).

Jurisdiction

The Second Circuit entered judgment on August 24, 1993 and less than 90 days have elapsed from that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes and Regulations Involved

The pertinent statutes and regulations at issue are: 42 U.S.C. § 1983 which allows a party to bring an action in federal court to redress any deprivation of rights caused by any person acting under color of state law; New York State Environmental

[1] References to "__a" are to the appendices to this petition.

Conservation Law § 71-0301 which grants and limits the authority of respondents to issue summary abatement orders and New York Environmental Conservation Law § 3-0301 which provides for and limits the authority of the respondents. The relevant portions of these statutes and regulations are reprinted in Appendix C, D and E, respectively.

Statement of the Case

1. The Summary Abatement Order

This action pursuant to 42 U.S.C. § 1983 was brought against the New York State Commissioner ("Jorling") and the Executive Deputy Commissioner of Environmental Conservation ("Marsh") for damages and to enjoin the enforcement of a summary abatement order (the "Order") issued by them. The Order, issued under color of the New York State Environmental Conservation Law ("N.Y.ECL"),[2] prohibits, in perpetuity, the operation of 19 federally documented and certified vessels in New York waters (3a). The Order was issued without a pre-deprivation hearing (4a).

The petitioners are corporations, some of which own or manage some of the 19 vessels, and individual members of the Berman and Frank families ("Berman"), who are past or present officers of some of the corporations. Of the 19 vessels, only one was alleged to have been involved in a violation of the N.Y.ECL. The accidental sinking of the barge Sarah Frank precipitated the Order (3a). It has been alleged by Jorling and Marsh, but never proven, that the sinking resulted in the release of oil, which if true, is a violation of the N.Y.ECL.

2. The Post-Deprivation Administrative Hearing

Three weeks after issuing the Order, a hearing was commenced before an administrative law judge ("ALJ") who was an employee of the New York State Department of Environ-

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[2] N.Y. ECL § 71-0301 (McKinney 1973). Reproduced as Appendix D hereto.

mental Conservation ("DEC"). The evidence presented by Jorling in support of the Order was culled almost exclusively from the records of the United States Coast Guard (6a). Although the Coast Guard has exclusive federal jurisdiction to permit vessels to operate in the waters of the United States, it did not see fit to revoke the certificates of these vessels. The administrative law judge found that the Order was justified and recommended that Jorling continue the Order unmodified (5a). Although Jorling was the ultimate decision maker under the DEC regulations, he recused himself because he had made statements to the press in announcing the Order which revealed his bias (5a). The decision was delegated to Marsh, who found that the Order should remain in place in perpetuity (6a).

3. Federal Court Action

This action was commenced in the Eastern District of New York on the basis of federal question jurisdiction under 42 U.S.C. § 1983 seeking damages and prospective injunctive relief. The District Court dismissed the action on Eleventh Amendment, immunity and abstention grounds and Berman appealed. The Court of Appeals affirmed the dismissal of this action on abstention and immunity grounds.

Reasons for Granting the Writ

Dismissal of this action vitiates a fundamental purpose of § 1983—to provide a federal forum to adjudicate civil rights violations by state officials. It also frustrates the intent of Congress to establish national vessel safety standards by allowing a state to vary the standards, in direct conflict with previous decisions of this Court. The decision of the Second Circuit in this case is contrary to prior law established by this court, prior decisions of the Second Circuit and three other circuit courts. By narrowing the applicability of § 1983, it encourages the ploy of disguising otherwise blatantly unconstitutional acts with a thin veil of environmental protection for legitimacy.

This case was brought to redress the thinly disguised attempt to put out of business a family which operates in the fiercely competitive market for vessel services in New York Harbor. For lack of an actual violation of New York environmental law, but not for lack of legitimate enforcement alternatives, Jorling and Marsh simply banished the family's vessels from the waters of New York State in perpetuity—behavior more befitting a despot than a constitutional democracy. Dismissing this case on abstention grounds does particular violence to § 1983, which is a quintessential federal cause of action. The question of abstention should never have been reached because the subject of the Order—vessel safety—is preempted by federal law. The fundamental elements of dismissal under the *Pullman* and *Burford* doctrines are missing in this case. The Second Circuit overlooked perhaps the most important form of relief available—prospective injunction—in justifying dismissal under *Pullman* (12a). Similarly, the Second Circuit attempted to justify dismissal under *Burford* by invoking the importance of state environmental law (13a). Yet no claim of violation of state environmental law was made against 18 of the 19 vessels involved. Consequently, this decision begs the fundamental question in a § 1983 action—did the state official violate the plaintiff's civil rights under color of state law?

I. § 1983 is Necessary to Balance the Extraordinary Powers Granted in Environmental Enforcement Legislation

The state law under which Berman's vessels were banished forever from the waters of New York is similar to many environmental statutes which grant extraordinary powers under circumstances of imminent danger to health and safety.[3] Such extraordinary discretionary power is naturally susceptible of abuse. An ALJ who is employed by the enforcement agency is

[3] *E.g.*, 42 U.S.C. § 9604 (Comprehensive Environmental Response Compensation and Liability Act ("CERCLA")), which grants authority to the President to enter property and undertake removal or remedial action without a pre-deprivation hearing. *See, e.g., Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991).

unlikely to recognize the abuse of such power[4] as are the state courts when faced with a claim of imminent environmental disaster.

The recognition that extraordinary power is subject to abuse is the fundamental underpinning of § 1983. The original purpose of the predecessor to this statute[5] was to provide a federal forum to adjudicate claims against state government actors where state authorities may be "*unable* or *unwilling* to enforce a state law." *District of Columbia v. Carter*, 409 U.S. 418, 426, 93 S.Ct. 602, 607, 34 L.Ed.2d 613 (1973), *quoting Monroe v. Pape*, 365 U.S. 167, 175, 81 S.Ct. 473, 478, 5 L.Ed.2d 492 (1961) (emphasis original). § 1983 was a federal response to the failure of the state courts to protect the federal rights of blacks against the efforts of the Ku Klux Klan. *See, District of Columbia v. Carter*, 409 U.S., at 423, 93 S.Ct., at 605. Accordingly, original jurisdiction in federal district court is a fundamental element of a § 1983 cause of action which has been improperly denied in this case.

II. The Order is Preempted by Federal Regulation Therefore Abstention Was Not Relevant[6]

The Order specifically states that Jorling prohibited the operation of the plaintiff vessels because there is a "serious risk of harm." In other words, the vessels are not safe to operate. However, federal law preempts the area of vessel safety determination. "[T]he Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment." *Ray v. Atlantic Rich-*

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[4] *See, e.g., Gibson et al. v. Berryhill et al.*, 411 U.S. 564, 93 S. Ct. 1689, 36 L.Ed.2d 488 (1973) (Administrative agency which was composed entirely of members of professional association which was a party to litigation against plaintiffs in § 1983 action, found to be biased).

[5] Civil Rights Act of 1871, § 1.

[6] This issue was raised in the District Court (19a), in Berman's brief to the Second Circuit and at oral argument, although not mentioned in the Court's opinion.

field Company, 435 U.S. 150, 167, 98 S.Ct. 988, 998, 55 L.Ed.2d 179 (1978).[7]

In *Ray*, the state of Washington attempted to prevent the operation of vessels in Puget Sound, unless they met design and construction criteria differing from the federal criteria which the state claimed were necessary to avoid oil spills. The Washington statute had the effect, as in this case, of prohibiting the operation of Coast Guard certified vessels in the waters of the state. This Court found that Congress strongly articulated the intent to create a national, if not international standard governing vessel safety. *Ray*, 435 U.S., at 161, 98 S.Ct., at 996, *citing*, 46 U.S.C. § 391a(1) (now 46 U.S.C. § 3306a). This Court concluded that individual state regulation would frustrate the objective of a uniform national standard. *Ray*, 435 U.S., at 165, 98 S.Ct., at 998.

Insofar as the operation of Berman's vessels are concerned, it should be clear that Jorling and Marsh may not substitute their own judgment of safety. As the Court pointed out in *Ray*, the Coast Guard regulations provide that a certificate of inspection from the Coast Guard "shall serve as a permit for such vessel to operate." *Ray*, 435 U.S. at 162, 98 S.Ct. at 996 n. 11 *quoting*, 46 CFR Pt. 31.05-1. All of the Berman vessels were issued certificates of inspection, except those which were out of service or did not require one. Jorling and Marsh took it upon themselves to effectively revoke certificates issued by the federal government. The Order was clearly contrary to the Congressional intent of the Ports and Waterways Safety Act and the teaching of this Court. 33 U.S.C. § 1221 *et seq*.

Accordingly, Jorling and Marsh have no authority to prohibit the operation of Berman's vessels, regardless of state law.

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[7] This is not to say that federally documented vessels need not comply with "reasonable, nondiscriminatory conservation and environmental protection regulations" which do not conflict with the Coast Guard regulations. *Ray v. Atlantic Richfield Co.*, 435 U.S. 148, 164, 98 S.Ct. 988, 997, 55 L.Ed.2d 179 (1978). However, Jorling and Marsh never alleged that any such regulations were violated by the vessels in question, with the exception of accidental sinking of the Sarah Frank.

Indeed, the Coast Guard has specific authority to prohibit vessels from operating in U.S. waters if the vessel's history of accidents, pollution incidents or serious repair problems creates reason to believe that the vessel may be unsafe or pose a threat to the environment. 33 CFR Pt. 160.113. In this case the Coast Guard did not see fit to prohibit any of plaintiffs' vessel from operation. Yet, on the basis of Coast Guard records, Jorling and Marsh claim to prohibit such operation, despite this Court's clear holding in *Ray* that the state may not substitute its judgment for that of the Coast Guard.

In dismissing the complaint, the District Court concluded that N.Y. Envtl. Conserv. Law § 71-0301 was not in direct conflict with federal law (25a). Berman never claimed that there was a conflict between the state summary abatement statute and federal law. Rather Berman's claim is that Jorling and Marsh have deprived them of their rights under color of state law—the gravamen of a § 1983 action.

III. The Abstention Analysis of the Second Circuit is Contrary to Established Law

A. *Pullman* Abstention

The doctrine of *Pullman*[8] abstention provides that a federal court should abstain "when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Housing Authority et al v. Midkiff et al.*, 467 U.S. 229, 236, 104 S. Ct. 2321, 2327, 81 L. Ed.2d 186 (1984). In applying this rule, the relevant inquiry is not "whether there is a bare, though unlikely, possibility that a state court might render adjudication of the federal question unnecessary. Rather, '[we] have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible

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[8] This abstention doctrine is referred to as *Pullman* abstention because it originated in the case entitled *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed.2d 971 (1941).

of a limiting construction.' " *Id, quoting, Zwickler v. Koota*, 389 U.S. 241, 251, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967).

In this case the statute in question authorized Jorling to issue a summary abatement order if the perceived harm "relates to the prevention and abatement powers of the commissioner" (32a). N.Y. Envtl. Conserv. Law § 71-0301 (McKinney 1973).[9] The prevention and abatement powers of the commissioner are explicitly spelled out in the enabling statute—"[P]rovide for prevention and abatement of all water, land and air pollution, including but not limited to that related to particulates, gases, dust, vapors, noise, radiation, odor, nutrients and heated liquids; . . ." (35a). N.Y. Envtl. Conserv. Law § 3-0301(i) (McKinney 1991).

The question then, is simply whether this statutory language is ambiguous and susceptible of a limiting construction by a state court. The answer must rationally be no, because (1) the plain language of the authorizing statute doesn't encompass vessel safety and (2) the United States Coast Guard has exclusive jurisdiction over whether a vessel may operate in the waters of the United States.

IV. *Burford* Abstention is Inappropriate Because Jorling and Marsh Made No Claim That Berman Violated State Law

The invocation of *Burford* abstention is in error. *Burford* abstention "applies in situations where it is prudent for a federal court to refrain from interfering in cases presenting state law issues relating to complex state regulations where the federal court decision may disrupt important state policies (citation omitted). Such abstention is appropriate when a federal case presents a difficult issue of state law." *Alliance of American Insurers v. Cuomo*, 854 F.2d 591 (2d Cir. 1988) *citing Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed.2d 1424 (1943).

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[8] Reproduced herein at appendix page 32a.

The Circuit Court invoked *Burford* abstention on the grounds that states have considerable discretion in protecting their waters from pollution (13a). However, the Court fails to identify any comprehensive scheme or settled administrative procedures that are relevant to this case (13a).

The state statutes involved here are not part of complex regulatory schemes. N.Y. Envtl. Conserv. Law § 71-0301 is very simple and the circumstances in which it may be invoked are set forth at N.Y. Envtl Conserv. Law § 3-0301 (34a).

V. The Second Circuit's Decision Creates a Conflict Among the Circuits Regarding the Issue of How a Federal Court Should Apply the *Pullman* Abstention Doctrine to Civil Rights Actions Brought Under 42 U.S.C. § 1983.

A. Introduction.

The Second Circuit's decision creates a conflict among the Circuits concerning the issue of how to apply *Pullman* abstention to actions brought under 42 U.S.C. § 1983. While there already exists a conflict among the Circuits as to whether federal courts should be reluctant to abstain in § 1983 cases, the Second Circuit's decision dismissed a civil rights action brought under § 1983 without retaining jurisdiction of the federal claims. This represents a departure from this Court's rulings and the decisions of the Third, Fifth, Sixth, Seventh, Eight and Ninth Circuit Courts.

B. This Court Has Held that Abstention is Disfavored in § 1983 Cases.

Because of the nature of the remedy sought by plaintiffs in civil rights cases, this Court has held that abstention is not favored in actions brought under 42 U.S.C. § 1983. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 627, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974). "[T]o force the plaintiff who has commenced a federal [civil rights] action to suffer the delay of state court proceedings might itself effect

the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler v. Koota*, 389 U.S. 241, 252, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967). Nevertheless, in extreme circumstances, *Pullman* abstention has been applied in civil rights cases, where the federal action raises a particularly difficult question of state law. *See Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). However, as a rule the *Pullman* doctrine is a ground for deferral, rather than outright dismissal, until the state court has resolved the state law issue. *See Growe v. Emison*, 1993 U.S. LEXIS 1780, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993).

C. The Circuits Differ on the Application of This Court's Principles Regarding Abstention in Civil Rights Cases.

While all of the Circuits cite the this Court's general proposition that *Pullman* abstention should be reluctantly invoked in § 1983 actions, the Circuits differ in their application of this principle. The Third, Sixth and Ninth Circuits have interpreted this general proposition strictly and have been extremely reluctant to abstain in § 1983 cases. The Fifth Circuit has interpreted this principle loosely and has often abstained under *Pullman* in civil rights actions. The Seventh and Eight Circuits do not appear to have a definitive rule on this matter, but generally sanction *Pullman* abstention in § 1983 cases. However, even the Circuits that have routinely invoked *Pullman* abstention in this type of case, have held that it is proper to stay or defer the federal court proceeding—while retaining jurisdiction—until the state court has determined the state law issues. In dismissing this action under *Pullman* without retaining jurisdiction, the Second Circuit has created a conflict with this Court and other Circuits.

D. The Third, Sixth and Ninth Circuits Strongly Disfavor Invoking *Pullman* Abstention in § 1983 Cases.

1. *Third Circuit*: In *Conover v. Montemuro*, 477 F.2d 1073 (3d Cir. 1973), a class action civil rights case was brought under § 1983 challenging the intake procedures of the Family

Court Division of the Philadelphia Court of Common Pleas. The District Court for the Eastern District of Pennsylvania abstained under the *Pullman* and *Younger*[10] abstention doctrines. The Circuit Court reversed, holding that abstention was not warranted in § 1983 claims. The Court stated that while normally abstaining under *Pullman* would be appropriate to avoid a premature decision of a federal constitutional issue, "the mandate from Congress in the Civil Rights Acts passed pursuant to the fourteenth amendment that federal courts will afford a prompt remedy for violations of that amendment" took precedence. *Id.*, at 1079-1080. The Court further stated that "the district court cannot abdicate its responsibility as an Article III court to determine facts which are of constitutional significance. . . . The purpose of Congress in enacting the Civil Rights Acts was to provide a federal forum for the enforcement of federal rights. (citation omitted) Where an adjudication of these rights rests heavily on a factual determination, the ultimate responsibility for making this determination lies with the article III courts." *Id.*, at 1081.

The District Courts in the Third Circuit have applied the *Conover* analysis. In *Christy v. Hamel*, 87 F.R.D. 381 (M.D. Pa. 1980), a former inmate of a state hospital brought a § 1983 action against the hospital's guards alleging that his civil rights were violated when he was transferred to a maximum security wing of the hospital. Defendants requested that the court abstain from hearing the matter under *Pullman*. The Court declined to abstain stating, "since Christy's claim is a civil rights action, it is 'one of the least likely candidates for abstention' ". *Id.*, at 387. The District Court applied the *Conover* analysis concluding that enforcement of the *Pullman* doctrine would cause inordinate delay which was not appropriate when dealing with civil rights claims. *See also, Pilgrim Med. Gr. v. N.J.S. Bd. of Med. E.*, 613 F.Supp. 837 (D.N.J. 1985) (The Dis-

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[10] The *Younger* abstention doctrine first articulated in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) applies when a federal court will potentially interfere with a pending state criminal proceeding or a state civil proceeding that implicates important state interests.

trict Court declined to abstain in a civil rights action holding that abstention was not warranted because of the potential lengthy delay in the adjudication of plaintiff's rights).

2. *Sixth Circuit*: In *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973), an action was brought by gas consumers against the gas company under 42 U.S.C. § 1983 alleging unconstitutional termination of gas service. The gas company argued that the District Court should have abstained from jurisdiction because the matter concerned state law issues and a remedy was available to the plaintiffs through the Public Utilities Commission of Ohio. The Sixth Circuit declined to abstain, stating that "cases involving vital questions of civil rights are the least likely candidates for abstention." *Id.*, at 170. The Court reasoned that federal courts have a responsibility to take jurisdiction of "important civil rights cases." *Id.*

A later decision in the Sixth Circuit re-affirmed the proposition that a federal court should not abstain in civil rights actions. In *Hanna v. Toner*, 630 F.2d 442 (6th Cir. 1980), *cert. denied*, 450 U.S. 919, 101 S.Ct. 1365, 67 L.Ed.2d 346 (1981), a § 1983 action was brought by four prisoners in the Cuyahoga County Juvenile Detention Home against the administrators of the Detention Home for alleged inhumane treatment. The U.S. District Court for the Northern District of Ohio abstained under *Pullman* and *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed.2d 1424 (1943) from hearing the action. The Circuit Court reversed, stating that this type of civil rights action "represent the exact sort of disputes over citizens rights with which the federal courts were created to deal." *Id.*, at 446. *See also, Crawley v. Hamilton County Commissioners*, 744 F.2d 28, 31 (6th Cir. 1984) (The Court reversed the District court's decision to abstain in a civil rights action following the standard in *Hanna*, stating that a § 1983 action was "the kind of case that should be litigated in a federal forum.")

3. *Ninth Circuit*: In *Canton v. Spokane School District*, 498 F.2d 840 (9th Cir. 1974), an action was brought under 42 U.S.C. § 1983 against a school district by parents and students who were unable to pay fees and thus, were precluded from

participating in certain public school programs. The District Court abstained. The Circuit Court reversed, stating that "it is reasonable to conclude that cases involving vital questions of civil rights are the least likely candidates for abstention. Indeed, the objectives of the Civil Rights Act would be defeated if we decided that this federal claim grounded on an alleged violation of the federal constitution would have to stagnate in the federal court until some nebulous or nonexistent remedy was pursued like a will-o'-the-wisp in the state court." *Id.*, at 846, *quoting Wright v. McMann*, 387 F.2d 519 (2nd Cir. 1967). Based upon this analysis, the Court concluded that abstention was not warranted.

The principles enunciated in *Canton* have been applied in several Ninth Circuit cases. In *Toussain v. Yockey*, 722 F.2d 1490, 1495 (9th Cir. 1984), the Court refused to abstain in an action brought by prisoners challenging their confinement in administrative segregation in state prisons, stating "abstention is not favored in section 1983 cases." In *Pue v. Sillas*, 632 F.2d 74 (9th Cir. 1980), the Court reversed the lower court's decision to abstain under *Pullman* in a civil rights action brought by a motorist alleging that the state's statutory presumption that a registered owner of a vehicle was guilty of parking violations violated his due process rights. The Court held that this type of abstention is undesirable when a federal hearing is sought on a section 1983 claim.

E. The Fifth Circuit Has Favored Abstention under *Pullman* in Civil Rights Cases.

Fifth Circuit: The Fifth Circuit, while paying lip service to the principle that abstention is not favored in section 1983 case, has invoked *Pullman* abstention in civil rights actions without hesitation. In *Romero v. Coldwell*, 455 F.2d 1163 (5th Cir. 1972), plaintiffs brought a civil rights class action for a determination of whether the one-man, one-vote concept applied to elected justices of the peace in El Paso County, Texas. The Circuit Court affirmed the lower court's decision to abstain under the *Pullman* doctrine. The Court stated that "traditional absten-

tion principles apply to civil rights cases" and that "[t]he policies furthered by abstention cannot be circumvented merely by the plaintiff's selecting a federal forum to the exclusion of the state forum." *Id.*, at 1167. Finally, the Court stated that "[r]etention of jurisdiction by the abstaining federal court pending state court determination is usually the better practice where a constitutional issue is involved." *Id.* Thus, the Court held that in § 1983 cases, it is proper to abstain under *Pullman*, allowing the state court to decide the state law issue but retaining jurisdiction pending the state court determination.

In a later case, the Fifth Circuit articulated its policy of abstaining under *Pullman* in § 1983 cases. In *Nissan Motor Corp. v. Harding*, 739 F.2d 1005 (5th Cir. 1984), an automobile manufacturer brought a civil rights action against the Texas Motor Vehicle Commission alleging that the retroactive application of the Texas Motor Code violated its due process rights. The Fifth Circuit affirmed the District Court's decision to invoke *Pullman* abstention, holding that *Pullman* abstention was proper in § 1983 cases as a "means of postponing federal jurisdiction to obtain a definitive state resolution of ambiguous state law issues". *Id.*, at 1011. The Court stressed, however, that "the *Pullman* abstention doctrine does not require a litigant remanded to state court to present his federal claims there: he may reserve such claims for federal court disposition." *Id.*

In several other cases, the Fifth Circuit has invoked *Pullman* abstention in section 1983 cases in a routine manner. *See Mereles v. Crosby County*, 724 F.2d 431, 433 (5th Cir. 1984) and *Stephens v. Bowie County*, 724 F.2d 434, 436 (5th Cir. 1984). (The Court abstained in two civil rights actions brought by indigent residents of a county alleging that they were denied due process by the county's failure to establish objective criteria for provisions of monetary aid under a Texas statute, stating that "strong policy considerations militate in favor of abstention.") *See also, Signad v. City of Sugar Land*, 753 F.2d 1338, 1340 (5th Cir. 1985), *cert. denied*, 474 U.S. 822, 106 S.Ct. 75, 88 L.Ed.2d (1985). (The court stated that "the *Pullman* type abstention is commonplace with section 1983

claims", while declining to abstain under the *Colorado River*[11] doctrine).

F. The Seventh and Eighth Circuits Have Generally Sanctioned Invoking *Pullman* Abstention in Civil Rights Actions.

1. *Seventh Circuit*: While not enunciating a clear rule that *Pullman* abstention should be routinely invoked and is commonplace in § 1983 actions, both the Seventh and Eight Circuits have approved of Courts abstaining under *Pullman* in civil rights actions. In *Lewellyn v. Gerhardt*, 513 F.2d 184 (7th Cir. 1975), plaintiffs brought a civil rights action challenging a statute under which the state transferred a tract of land to a county. The District Court for the Southern District of Indiana dismissed the complaint under the *Pullman* abstention doctrine. The Court affirmed the decision to invoke *Pullman* abstention, holding that abstention is appropriate notwithstanding the fact that plaintiff brought the suit as a civil rights action. The Court, however, reinstated the cause of action and directed the District Court to enter an abstention order that postpones any decision of the federal question pending the determination of the state court. *See also, Waldron v. McAtee*, 723 F.2d 1348 (7th Cir. 1983). (The Court held that it was proper to invoke the doctrine of abstention in a civil rights action, but stayed the action pending state court determination of the interpretation of a loitering ordinance that plaintiffs claimed was unconstitutional.)

2. *Eighth Circuit*: In *George v. Parratt*, 602 F.2d 818 (8th Cir. 1979), state prisoners brought a civil rights action against the warden of the prison claiming constitutional violations arising out of the deprivation of certain *good time credits* for time served in the state prison complex. The Court affirmed the lower court's decision to abstain, holding that there are numer-

[11] The *Colorado River* doctrine, first articulated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) gave federal courts discretion to abstain because of the pendency of a parallel state court proceeding.

ous civil rights cases where abstention has been held to be appropriate. The Court further determined that while the state court should decide the state law issues, the plaintiff's federal right to due process must still be adjudicated in federal court. *See also, Coley v. Clinton*, 635 F.2d 1364 (8th Cir. 1980). (The Court cited *Parratt* in deciding to abstain under *Pullman* in an action brought by former inmates of a state mental hospital seeking to maintain a class action civil rights suit against the State of Arkansas for its practice of confining all inmates to a certain institution.)

G. The Second Circuit Decision Creates a Conflict With This Court and the Other Circuits.

The Second Circuit decision wholly disregarded this Court's principle that abstention is not favored in § 1983 cases. In addition, the Second Circuit applied the *Pullman* abstention doctrine to dismiss, rather than defer the federal adjudication of petitioners' civil rights claims. The Court admitted as much, by stating "[o]rdinarily, dismissal is not the proper result of *Pullman* abstention. Instead, the district court should stay the federal proceedings to permit the parties to resolve in state court the difficult issue of state law. Then either the federal case would be mooted, or the parties might return to federal court to resolve the remaining federal issues in light of the then established state law." (12a) Nevertheless, the Court dismissed the action, rather than staying the federal claims allegedly "because no federal damage claims remain." (12a)

However, Berman's federal claims for a declaratory judgment and injunctive relief remain. These claims seek to have the federal court enjoin the state officials from continuing their deprivation of petitioners' rights long after the alleged "imminent harm to the environment" has passed. These claims remain regardless of the state court interpretation of the respondents' authority under the state summary abatement statute.

The Second Circuit should have stayed rather than dismissed this action and allowed the state court to interpret and define the extent of the DEC's authority under the summary abatement

statute. By merely staying the action, the federal court would retain jurisdiction over petitioners' civil rights claims and determine their validity once the state law issues were resolved. In that scenario, the concern expressed in *Pullman* that federal courts should not determine state law issues, would vanish.

Even in those circuits where *Pullman* abstention is considered appropriate in civil rights cases, the courts have held that the plaintiffs' right to due process should be adjudicated in federal court. *See Romero v. Coldwell*, at 1167 (5th Cir.); *Nissan Motor Corp. v. Harding*, at 1011 (5th Cir.); *Lewellyn v. Gerhardt*, (7th Cir.); *Waldron v. McAtee*, (7th Cir.) and *George v. Parratt*, (8th Cir.).

In dismissing Berman's civil rights claims altogether, the Second Circuit has vitiated the fundamental purpose of § 1983 which is to provide a federal forum to adjudicate civil rights violations by state officials where state courts may be unable or unwilling to do so. In addition, by dismissing the action outright, the Second Circuit decision created a conflict with this Court's decisions and the decisions of several other Circuits. Accordingly, this Court should grant certiorari to resolve the conflict created by the Second Circuit's decision.

VI. The Second Circuit Failed To Apply The Appropriate Test Established By This Court To Determine Whether An Official Is Entitled To Qualified Immunity.

A. This Court Modified the Test for Qualified Immunity in *Harlow v. Fitzgerald*.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), this Court modified the standard for determining whether officials are entitled to qualified immunity. Before *Harlow*, the standard was that "qualified immunity would be defeated if an official knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention

to cause a deprivation of constitutional rights or other injury." *Id.*, at 815, *citing Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

In *Harlow*, the Court derided the so-called "subjective" element in the standard for qualified immunity, stating that "[t]he subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz*[12] that insubstantial claims should not proceed to trial." *Harlow* at 815-816. This Court concluded that an objective reasonable man test should apply and "bare allegations of malice should not suffice to subject government officials either to the costs of trial or the burdens of broad-reaching discovery." *Id.*, at 817-818.

The Court's intent was to define the limits of qualified immunity in objective terms and therefore, avoid excessive disruption of government. The Court decided to alter the test and focused on the objective reasonableness of an official's conduct, stating government officials are shielded from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable man would have known." *Id.*, at 818. The Court further stated that "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Id.*, at 819.

However, while *Harlow* changed the test for qualified immunity from a subjective one to an objective one, it did not eliminate the *reasonably should have known* prong of the test. It does not appear that the intent of *Harlow* was to furnish officials with immunity in every case where they claim that they did not know that they had violated constitutional rights. *Harlow* changed the analysis to whether a reasonable man objectively should have known that his actions were violative of the Constitution. However, the Court clearly stated that where an

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[12] *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978).

official reasonably should have known that his actions violated constitutional rights, he is not immune.

B. The Fifth, Sixth, Seventh, Eighth and Tenth Circuits Have All Applied the *Reasonably Should Have Known* Prong of the *Harlow* Test.

Several Circuit Courts have followed the *Harlow* reformulation of the qualified immunity test and have continued to apply the *reasonably should have known* prong of the test. In *Cronen v. Texas Dept. of Human Services*, 977 F.2d 934 (5th Cir. 1992), an indigent person brought a civil rights action against state officials for their alleged unconstitutional denial of his request for food stamps. The Fifth Circuit Court of Appeals applied the *Harlow* objective test of whether the defendant violated clearly established statutory or constitutional rights. The Court further held that "we must also consider whether the defendants reasonably should have known of the right [to food stamps]. That, too, is a factual issue inappropriate for resolution on summary judgment." *Id.*, at 940. Holding that the defendants reasonably should have known that their actions violated plaintiffs' constitutional rights, the Court denied summary judgment.

The Sixth Circuit has applied the test for qualified immunity test in the same manner as the Fifth Circuit. In *Long v. Norris*, 929 F.2d 1111 (6th Cir. 1991), *cert. denied*, 1991 U.S. LEXIS 4535, 112 S.Ct. 187, 116 L.Ed.2d 148 (1991), inmates brought a § 1983 action against prison officials challenging a policy which authorized strip and body cavity searches of visitors. The Sixth Circuit Court denied the prison officials qualified immunity, applying "the objective reasonableness test [which] focuses on whether an official, given the facts that the official knew or reasonably should have known about the situation, should have known that his or her particular conduct would not pass scrutiny when applied to the law." *Id.*, at 1115.

The Tenth Circuit has similarly applied the *Harlow* test. In *Chapman v. Nichols*, 989 F.2d 393 (10th Cir. 1993), several prisoners brought a civil rights action against a sheriff to

recover damages after they were subjected to strip searches at jail following arrest. The Court applied the "knew or reasonably should have known of the constitutionally violative effect of their actions." test. *Id.*, at 397. The Court further stated that "[l]aw enforcement officials must be cognizant not only of how far their authority extends, but also of the point at which their authority ends." *Id.*, at 397, *quoting*, *Ward v. County of San Diego*, 791 F.2d 1329 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020, 107 S.Ct. 3263, 97 L.Ed.2d 762 (1987). The Court found that the officials reasonably should have known that their authority did not extend to strip searches and held they were not immune from liability.

Similarly, in *Walters v. Grossheim*, 990 F.2d 381 (8th Cir. 1993), the Eighth Circuit held that prison officials were not entitled to qualified immunity because they reasonably should have known that they had violated an prison inmate's civil rights by failing to return the inmate to a less restrictive environment. *See also, Hill v. Shelander*, 992 F.2d 714 (7th Cir. 1993) (The Seventh Circuit interpreted the *Harlow* test using an objective analysis of whether a government official should have known that his actions violated constitutional rights in denying immunity for a prison sergeant who beat an inmate.)

C. The Second Circuit Decision in This Case Failed to Even Consider Whether Jorling and Marsh Reasonably Should Have Known That Their Actions Would Violate Petitioners' Constitutional Rights.

The Second Circuit Decision completely omitted the *reasonably should have known* prong of the qualified immunity test from its analysis of respondents' actions. The Court merely stated that the law governing their conduct was not clearly established and therefore, they were immune from liability. The Court failed to consider whether respondents Jorling and Marsh reasonably should have known that their authority under the summary abatement statute did not extend to permanently depriving petitioners of their business when no New York laws were alleged to have been violated. The Second Circuit further

failed to consider whether respondents reasonably should have known that the federal constitution does not allow petitioners' rights to be violated without a pre-deprivation hearing. The Court merely found that because a statute existed purportedly giving respondents' authority to issue a summary abatement decision, they did not know that their actions were violative of petitioners' rights.

The Second Circuit's analysis is contrary to the *Harlow* holding that "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Harlow*, at 819. The decision also contradicts the Fifth, Sixth, Seventh, Eighth and Tenth Circuits who have all continued the apply the *reasonably should have known* prong of the *Harlow* test. In light of the Second Circuit's failure to apply the Harlow test in the correct manner and its conflict with the other Circuit Courts, this Court should grant certiorari to resolve these issues.

Conclusion

The decision of the Second Circuit deprives Berman of its only avenue of redress for the permanent confiscation of their means of livelihood. The federal preemption of the actions of Jorling and Marsh which should have been dispositive of this case was ignored in favor of the misapplication of the *Pullman*, *Burford* and *Harlow* doctrines. This petition should be granted to permit a meaningful review of the denial of Berman's business in perpetuity.

Respectfully submitted,

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November 1993

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 443—August Term, 1992

(Argued: December 14, 1992 Decided: August 24, 1993)

Docket No. 92-7680

BERMAN ENTERPRISES, INC.; GENERAL MARINE TRANSPORT CORPORATION; STANDARD MARINE SERVICES, INC.; JANE FRANK KRESCH, as Secretary of Berman Enterprises; EVELYN BERMAN FRANK, as Chief Executive Officer of General Marine Transport Corporation and as an Officer of the other named corporations; and PETER M. FRANK, as President of General Marine Transport Corporation,

Plaintiffs-Appellants,

—against—

THOMAS C. JORLING, in his individual capacity and in his official capacity as Commissioner of the New York State Department of Environmental Conservation; and LANGDON MARSH, in his individual capacity and in his official capacity as Executive Deputy Commissioner of the New York State Department of Environmental Conservation,

Defendants-Appellees.

Before:

CARDAMONE and PRATT, *Circuit Judges*,
and Morris E. LASKER, *District Judge* of the United States
District Court for the Southern District of New York,
sitting by designation.

Appeal from a judgment of United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge*, that dismissed complaint challenging abatement orders and barge-license revocations imposed on plaintiffs for polluting New York harbor.

Affirmed.

CHRISTOPHER CARPENTIERI, New York, NY (Stults, Balber, Horton & Slotnik, of counsel), *for Plaintiffs-Appellants*.

GREGORY J. NOLAN, Assistant Attorney General for the State of New York (Robert Abrams, Attorney General; Jerry Boone, Solicitor General, of counsel), *for Defendants-Appellees*.

PRATT, *Circuit Judge*:

Plaintiffs appeal from a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge*, that dismissed their amended complaint, which challenged summary abatement orders issued by defendants under New York Environmental

Conservation Law § 71-0301. *Berman Enterprises, Inc. v. Jorling*, 793 F. Supp. 408 (E.D.N.Y. 1992). The orders prohibited plaintiffs from operating some of their oil and sludge barges in New York Harbor. The district court dismissed the complaint on multiple grounds. We affirm, on grounds of qualified immunity and abstention.

BACKGROUND

Plaintiffs—three corporations and three of their officers—operate oil-carrying and sludge-carrying barges in various areas, including New York harbor. The orders at issue treated plaintiffs as a single business run by the Berman and Frank families and drew no distinctions between or among the individual plaintiffs and the corporate plaintiffs. Hereinafter, plaintiffs are referred to as "Berman".

Defendant Thomas Jorling is Commissioner of the New York State Department of Environmental Conservation ("DEC"). Defendant Langdon Marsh is Executive Deputy Commissioner of the DEC. Berman sued both Jorling and Marsh in their individual and official capacities.

In late September 1990, one of Berman's barges sank in the Arthur Kill at Staten Island, New York, spilling both oil and sludge into the water. Three weeks later Jorling, acting under N.Y. Envtl. Conserv. Law § 71-0301 (McKinney 1984), issued a summary abatement order, which is the principal target of this lawsuit. By that order Jorling (1) immediately suspended the petroleum-facility licenses for 14 of Berman's barges, (2) required Berman to empty all cargo from the barges, and (3) ordered that the barges "shall remain docked and shall not be operated in the New York Marine district".

The specific barges involved are identified in the summary abatement order as "listed by number in Appendix 1". Appendix 1 was not, however, supplied to this court as part of either the parties' joint appendix or the record on appeal filed with the clerk. While there are disputes over many of the circumstances affecting individual barges, those disputes do not affect the outcome of this appeal, and the absence of Appendix 1 from the record does not prevent our deciding this case.

Section 71-0301 requires that a summary abatement order provide the target of the order with an opportunity for a hearing within 15 days. Accordingly, Jorling's October 18, 1990, order scheduled a hearing for October 30, 1990, to address the merits of the summary abatement order as well as revocation of the 14 petroleum-facility licenses that DEC had previously issued to Berman's barges under New York's Navigation Law. *See* N.Y. Nav. Law § 174 (McKinney 1989); 17 N.Y.C.R.R. § 30.10(b).

Berman immediately commenced an action in the United States District Court for the Southern District of New York, John E. Sprizzo, *Judge*, seeking to enjoin enforcement of any provisions of New York's Environmental Conservation Law, the Navigation Law, or the summary abatement order that would prevent Berman from operating its 14 barges that comply with federal law. Berman's claim was grounded in 42 U.S.C. § 1983 and advanced arguments based on the supremacy clause, the commerce clause, and the fourteenth amendment.

On October 30, 1990, Judge Sprizzo refused to interfere with the state's proposed hearing, and seven days later the parties stipulated to discontinue the Southern District action. Berman's claims under the supremacy clause and commerce clause were discontinued with prejudice; its

claims under the fourteenth amendment were discontinued without prejudice.

The hearing went ahead before an administrative law judge ("ALJ") of the DEC's Office of Hearings, Edward Buhrmaster, and testimony was taken on various days over the course of the next month. After post-hearing memoranda were submitted, the hearing record was closed on January 22, 1991. In a 60-page, single-spaced decision the ALJ resolved most of the factual and legal issues against Berman. He concluded with four recommendations:

(1) The 14 major-facility licenses that had been suspended should be revoked.

(2) The summary abatement order issued by Jorling should be continued without modification.

(3) Modifications proposed by the staff to allow for limited operation of the barges should be rejected.

(4) The summary abatement order should not be broadened to incorporate four other barges owned by Berman, because those barges were not named in the order, and the request to incorporate them was made after the evidentiary record was closed.

Under the procedure established by the DEC, the ALJ's report and recommendations were to be reviewed and acted upon by the commissioner. *See* 6 N.Y.C.R.R. § 622.14 (final determination and order). Commissioner Jorling, however, had disqualified himself from any further participation in the proceeding and had delegated his responsibilities to Executive Deputy Commissioner Marsh.

By decision dated March 25, 1991, Marsh reviewed Berman's objections to the ALJ's report and recommendations and entered a final order that followed the recommendations. Specifically, Marsh found that Berman operated roughly 30 vessels in the New York harbor area, including oil barges, sludge barges, and tugs; that the several corporations acted under the common management of the Berman and Frank families; that over the previous 11 years the 14 vessels that were the subject of the summary abatement order had "compiled records of chronic noncompliance with state and federal regulations which are designed to protect the environment, public health and safety"; that the vessels had received various citations from the United States Coast Guard for both administrative and safety violations; that some of the violations had involved serious injury or loss of life or environmental damage; that there were some documented incidents of pollution in New York harbor in which no violations were cited; that some of the violations and pollution incidents were the direct result of improper management by Berman; that the "sheer number of violations and pollution incidents and their duration for over a period of eleven years is * * * noteworthy"; that Berman had presented no information as to efforts it had undertaken over the previous 11 years to implement programs of preventive maintenance or inspections, to improve management, or otherwise to address the cause of the problems; and that there was no explanation as to why Berman experienced such difficulty in complying with the Coast Guard's safety regulations.

On the summary abatement issue, Marsh concluded that "the continued operation of these vessels by the Respondents carries with it a substantial risk that these and other incidents will reoccur"; that the nature of Berman's busi-

ness and a survey of the incidents caused by its operations in the past "demonstrate the potential for creating serious environmental and safety hazards"; that "continued operation of the fleet of vessels by these Respondents carries with it a serious risk of harm"; and that the harm is "imminent" and "potentially quite serious".

With respect to the suspended licenses, Marsh found that revocation of the 14 licenses was required because "continued operation of the barges represents a menace to the New York harbor environment".

Finally, Marsh ordered that the summary abatement order was "confirmed in whole and extended"; that "no modification to such Order is granted"; and that the 14 "major facility licenses" were revoked.

Berman then brought this action against both Jorling and Marsh. Its first five causes of action, brought under 42 U.S.C. § 1983, sought damages against Jorling and Marsh in their personal capacities for substantive and procedural due process violations; the sixth sought declaratory relief that the defendants' orders are unconstitutional; and the seventh sought attorneys fees and costs. The eighth and ninth causes of action, advanced under the court's supplemental jurisdiction, 28 U.S.C. § 1367, sought to vacate the decision and order of defendant Marsh under Article 78, N.Y. Civ. Prac. L. & R. §§ 7801-7806 (McKinney 1981), as being arbitrary and capricious and as lacking substantial evidence.

On defendants' motion under rules 12(b)(1) and (6), Fed. R. Civ. P. 12(b)(1), (6), Judge Weinstein dismissed the complaint on multiple grounds. In a scholarly analysis, he rejected Berman's contention that federal law preempted state authority to bar Berman's barges from operating in New York harbor. Further, he found that

Berman's entire complaint was barred by the eleventh amendment; that both Jorling and Marsh enjoyed qualified immunity; and that dismissal was also warranted under *Burford* abstention and *Pullman* abstention. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

The district court did not expressly dispose of Berman's two claims under Article 78; implicitly, however, it declined to exercise supplemental jurisdiction and dismissed them. As had been revealed at oral argument on the motion to dismiss, those claims could still be asserted in state court, since the statute of limitations had been tolled under New York law by the bringing of this suit.

DISCUSSION

Preliminarily, we agree with Judge Weinstein's rejection of Berman's claim that federal law preempts any state regulation of Berman's barges in New York harbor. As to the remainder of the appeal, we affirm the judgment of the district court on the combined grounds of qualified immunity and abstention, but the district court's rulings regarding the eleventh amendment and *Pullman* abstention require clarification.

A. Eleventh Amendment.

Berman asserted his § 1983 claims against Jorling and Marsh in both their individual and official capacities. To the extent that the suit sought damages from defendants in their official capacities, dismissal under the eleventh amendment was proper because a suit against a state official in his official capacity is, in effect, a suit against the state itself, which is barred. *Hafer v. Melo*, 112 S. Ct. 358 (1991). However, the eleventh amendment does not

extend to a suit against a state official in his individual capacity, even when the conduct complained of was carried out in accordance with state law. *Hafer*, 112 S. Ct. at 364-65. Judge Weinstein concluded that the state is the real party in interest in this case. We disagree. The complaint specifically seeks damages from the defendants in their individual capacities and the mere fact that the state may reimburse them does not make the state the real party in interest. Whether or not a state would choose to reimburse an official for damages for constitutional harm he caused in his individual capacity is a matter of no concern to a federal court.

Nor was Berman's claim for declaratory relief barred by the eleventh amendment. Under *Ex Parte Young*, 209 U.S. 123 (1908), acts of state officials that violate federal constitutional rights are deemed not to be acts of the state and may be the subject of injunctive or declaratory relief in federal court. *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (citing *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978)).

To the extent, therefore, that Berman sought (a) damages against defendants in their individual capacities and (b) declaratory relief vacating the defendants' two orders, its claims were not barred by the eleventh amendment. This does not mean, however, that the court's ultimate disposition of the action was wrong. Both the damage claims and the declaratory judgment claim fail for different reasons: qualified immunity and abstention, respectively.

B. Qualified Immunity.

Under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and its progeny, public officials have immunity from liability

for damages under § 1983 when their "conduct does not violate clearly established * * * rights of which a reasonable person would have known." *Id.* at 818. When Jorling and Marsh acted, the law governing their conduct was not "clearly established"; therefore, both defendants are entitled to qualified immunity from the claims against them in their individual capacities.

The essence of Berman's claims is that by issuing the summary abatement order and the final order the defendants exceeded their authority under state law and thereby deprived Berman of property without due process. The critical issue then is whether the commissioners had the authority to issue the abatement orders and to revoke the licenses. The answers require extensive interpretations of state statutes and regulations, application of those statutes and regulations to facts before the commissioners, and an evaluation of the potential harm that would result in the absence of abatement.

Superficially, at least, defendants' conduct here followed the provisions of the New York statutes; both summary and final abatement orders are authorized, *see* N.Y. Envtl. Conserv. Law § 71-0301; 6 N.Y.C.R.R. § 622.14(a), as are revocations of the vessel licenses, *see* N.Y. Nav. Law § 174; 17 N.Y.C.R.R. § 30.10. Nothing the defendants did is expressly prohibited under state law. Underlying every one of Berman's claims is its assertion that Jorling and Marsh went too far in enforcing New York's rules against polluting rivers. Most particularly, Berman attacks the abatement orders on the ground that they were directed against the business itself, rather than against a particular, imminent hazard to the environment. This claim, as Judge Weinstein commented below, raises "unresolved and difficult questions of state law" of which "[t]he state courts have not had occasion to provide an

authoritative interpretation". *Berman Enterprises*, 793 F. Supp. at 414.

We agree that the parameters of the commissioners' powers under the statutes and regulations is not well defined or easily understood. Certainly, it cannot be said it is "clearly established" that they lacked the authority to act as they did. If Jorling was empowered to issue the summary abatement order, Berman's suit collapses. While the commissioners' claim to power is plausible, there is no clear indication in the statutes or regulations that the specific action taken here was authorized, and there are no cases ruling on the point. In short, the extent of the commissioners' authority is not yet clearly delineated. Even if it should ultimately turn out that they exceeded their authority, the uncertainty of their authority under New York law protects them from liability for damages in this suit under the doctrine of qualified immunity.

Marsh is more clearly entitled to qualified immunity than Jorling, for his actions followed a more clearly defined statutory path. Marsh's conduct involved reviewing the ALJ's findings and recommendations and making a final determination of the abatement order and licensing revocations. On the legal side, he stands in no weaker position than Jorling: abatement and license revocation are both contemplated by statute. On the factual side, Marsh did not act summarily as did Jorling; instead, he had an extensive record to work with, plus findings and recommendations by the ALJ. Exercising his statutorily based executive power in these circumstances was, therefore, protected by qualified immunity.

To this point we have established that Berman's claims against Jorling and Marsh are barred by the eleventh amendment insofar as they are asserted against them in

their official capacities, and by qualified immunity insofar as they are asserted for damages against them in their individual capacities. What remains are Berman's claims for declaratory relief and Article 78 relief, on which the district court abstained.

C. Abstention.

The district court concluded that dismissal was proper under both *Pullman*, 312 U.S. 496, and *Burford*, 319 U.S. 315. Ordinarily, dismissal is not the proper result of *Pullman* abstention. Instead, the district court should stay the federal proceedings to permit the parties to resolve in state court the difficult issue of state law. Then either the federal case would be mooted, or the parties might return to federal court to resolve the remaining federal issues in light of the then established state law.

Here, however, no federal damage claims remain. The only unresolved federal claim is for a declaration as to whether the abatement orders and license revocations are valid, and that issue turns on state law. Once the state court resolves that issue there will be nothing left to litigate in federal court. Thus, dismissal of the federal claim in its entirety was appropriate.

The district court correctly perceived that the centrality of the state-law dispute over the extent of the commissioner's power called for abstention. Retaining jurisdiction for a later disposition, however, would not have made any sense, because whichever way the state-law issue might be resolved, Berman's § 1983 claim against the commissioners would fail. If the state court should determine that the commissioners had authority to issue the abatement orders, then Berman suffered no constitutional harm. On the other hand, if the state court

should determine that they lacked that authority, while Berman might have suffered a constitutional harm, the commissioners' qualified immunity would bar any monetary recovery because, as we have already indicated, until the state court has ruled on the issue it cannot be said that their lack of authority was "clearly established".

We also agree with Judge Weinstein that *Burford* abstention, which does require dismissal, is appropriate here. As contemplated by federal law, states are given considerable leeway in protecting the purity of their own waters. *See* Federal Water Pollution Control Act, 33 U.S.C. § 1321(o)(2). New York, through a combination of statutes and regulations under the Environmental Conservation Law and the Navigation Law has established a complex, even bewildering, system for regulating such matters as oil and sewage pollution. In a case such as this, where the decisive issue hinges entirely on the proper meaning and reach of those state statutes and regulations, a federal court should abstain in favor of the state's interpreting its own law.

Upon oral argument of the motion before Judge Weinstein, it was established that Berman had brought this action within the period for commencing a state-court Article 78 proceeding, and that the state statute of limitations is tolled until this action is finally disposed of. Since our disposition of Berman's state Article 78 claims, as well as its § 1983 claim for declaratory relief, is dismissal for lack of jurisdiction, Berman is still able to pursue those claims in state court, provided it moves promptly—perhaps even before the mandate is issued from this court.

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 91-2789
FILED MAY 18, 1992

BERMAN ENTERPRISES, INC., GENERAL MARINE TRANSPORT CORP., STANDARD MARINE SERVICES, INC., JANE FRANK KRESCH, as Secretary of Berman Enterprises, EVELYN BERMAN FRANK, as Chief Executive Officer of General Marine Transport and as an officer of the other named corporations, and PETER M. FRANK, as President of General Marine Transport,

Plaintiffs,

—against—

THOMAS C. JORLING, Commissioner of the New York State Department of Environmental Conservation, and LANGDON MARSH, Executive Deputy Commissioner of the New York State Department of Environmental Conservation,

Defendants.

MEMORANDUM, ORDER and JUDGMENT

APPEARANCES

For the Plaintiffs:

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JACK B. WEINSTEIN, *District Judge*:

By authority of New York's complex of environmental statutes and rules, plaintiffs, regarded by the state as persistent polluters, have been put out of the business of transporting petroleum and petroleum products on New York's waterways. Claiming violation of their federal rights, they seek damages and permission to restart their business. For the reasons indicated below, the case must be dismissed. Plaintiffs are left to pursue remedies in state court.

I. FACTS

Plaintiff Standard Marine Services, Inc. is a Delaware corporation whose principal place of business is New York. It is the corporate parent of plaintiffs Berman Enterprises, a New York corporation, and General Marine Transport Corp., a New Jersey corporation. The corporations own barges used for the transportation of oil. The remaining plaintiffs are or were officers of Berman and General Marine.

On September 27, 1990, one of the plaintiffs' barges sank in the Arthur Kill, a waterway between New Jersey and Staten Island. An oil spill resulted. Pursuant to New York Environmental Conservation Law § 71-0301, defendant Jorling, the Commission of the Department of Environmental Conservation (DEC), issued a Summary Abatement Order on

October 18, 1990. The order called for the plaintiffs to cease immediately the operation of vessels involved in petroleum transportation.

Section 71-0301 grants the Commissioner broad power to act summarily to abate environmental hazards. It provides in part:

> Notwithstanding any inconsistent provisions of law, whenever the commissioner finds, after investigation, that any person is causing, engaging in or maintaining a condition or activity which, in his judgment, [1] presents an imminent danger to the health or welfare of the people of the state or results in or is likely to result in irreversible or irreparable damage to natural resources, and [2] relates to the prevention and abatement powers of the commissioner and it therefore appears to be prejudicial to the interests of the people of the state to delay action until an opportunity for a hearing can be provided, the commissioner may, without prior hearing, order such person . . . to discontinue, abate or alleviate such condition or activity, and thereupon such person shall immediately discontinue, abate or alleviate such condition or activity.

Id. (bracketed numbers added). Violators are subject to fines and may be joined from the violative activity. *See* 6 NYCRR § 620. Persons subject to a Summary Abatement Order must be granted a hearing as soon as possible within 15 days of the order at which they may offer proof that their activity is not threatening to the people or environment of the state.

The Summary Abatement Order in this case suspended indefinitely the operation of 14 vessels owned by plaintiff Berman and used for the transportation and storage of oil. It also required plaintiffs to remove all oil from the vessels within seven days. The Commissioner claimed that the plaintiffs' past violations of New York Navigation Law indicated that the continued operation of the vessels would likely result in unreported discharges of oil, toxic waste water or sewage

sludge that would cause irreparable harm to the environment and people of New York.

The Summary Abatement Order also suspended licenses issued for the vessels under Article 12 of the New York Navigation Law and gave notice that, in light of plaintiffs' environmental record, the Commissioner intended to revoke the licenses altogether pursuant to powers provided in 17 NYCRR § 30.10(b).

Article 12, entitled "Oil Spill Prevention, Control, and Compensation," codified at §§ 170-97, establishes a licensing system designed to assure prompt cleanup of oil spills through the creation of a cleanup fund. Section 174(1)-(4) prohibits the operation of any "major facility" without a state license. Major facilities are defined to include vessels that transfer petroleum to other vessels. *See* New York Navigation Law § 172(11). Licenses, which must be renewed each year, are issued upon submission by the licensee of a certificate providing information about a facility's operation and upon payment of licensing fees and surcharges indexed to the number of barrels of petroleum transferred to or from each major facility. The licensee's submissions must include a showing that it (1) is complying with, or taking steps to comply with, "state and federal plans and regulations for control of discharges of petroleum, and the containment and removal thereof" and (2) "can provide necessary equipment to prevent, contain and remove discharges of petroleum." *Id.* § 174(3) & (8). The DEC Commissioner is authorized to impose fines if the owner of a major facility fails to file a certificate or willfully falsifies information on a certificate. *Id.* §174(7). Owners and operators of vessels that illegally discharge petroleum are liable for cleanup costs and damages. *Id.* § 181. In the event of a spill, either the state or affected individuals may conduct a cleanup and obtain compensation for the cost from a fund created by the collection of license fees, surcharges and fines. *Id.* §§ 176, 179.

In addition to suspending the vessels' operation and giving notice of the proposed license revocation, the Summary

Abatement Order also gave notice, as required by section 71-0301, of a hearing to be conducted starting on October 30, 1990 at offices of the DEC. The hearing before an administrative law judge lasted through November. Additional time for document submissions was granted, and the record was closed on January 22, 1991. The judge considered whether the plaintiffs had violated section 71-0301 and whether their section 174 licenses should be revoked. Testimony and court records indicated that plaintiffs had repeatedly illegally dumped waste materials, operated unlicensed vessels, and withheld material information in obtaining operating licenses. Based on this record, the administrative law judge recommended upholding the Summary Abatement Order and license revocations. On March 25, 1991, defendant Executive Deputy Commissioner Marsh issued a Decision and Order to that effect.

In October 1990, upon receiving the Commissioner's Summary Abatement Order, plaintiffs filed an action in the United States District Court for the Southern District of New York challenging the Order. Plaintiffs' motion for a preliminary injunction was denied by that court. By joint stipulation, the parties dismissed that case without prejudice on November 6, 1991.

The current action was commenced in August of 1991. Plaintiffs' second amended complaint brings claims under 42 U.S.C. § 1983 for deprivation of liberty and property without due process of law. Relief obtainable in the state courts under Article 78 of the New York Civil Practice Law and Rules is sought under the court's supplemental jurisdiction. *See* 28 U.S.C. § 1367.

The crux of the complaint is that the Commissioner and Executive Deputy Commissioner's decisions to shut down the plaintiffs' oil transport business were driven by malice and were made without factual foundation and with inadequate procedural safeguards. Plaintiffs seek a declaration annulling the Summary Abatement Order and the license revocation,

damages against the Commissioner and the Executive Deputy Commissioner personally and attorney's fees.

Defendants have moved to dismiss the complaint for lack of subject matter jurisdiction or for failure to state a claim. The motion is based on eleventh amendment immunity, official immunity and various theories of abstention. At oral argument on the motion, plaintiffs raised the additional claim that the Summary Abatement Order and license revocation should be annulled because the statutes under which the Commissioner acted—Environmental Conservation Law § 71-0301 and Navigation Law § 174—are preempted by federal law. The court denied defendants' motion to dismiss with leave to renew to allow for additional submissions and argument on the preemption issue. The issues have been fully briefed and argued.

II. LAW AND APPLICATION TO FACTS

A. ELEVENTH AMENDMENT

The eleventh amendment bars private citizens from suing states in federal court. *Hans v. Louisiana*, 134 U.S. 1 (1890). Officials sued in their personal capacity and local governmental bodies generally do not share in the states' immunity from federal court jurisdiction. *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974); *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 690 n.54 (1978). State executive branch agencies, however, generally are protected as organs of the state, at least insofar as "the governmental unit simply is functioning as the alter ego of the state in accomplishing some public purpose." 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3524, at 136 (2d ed. 1984).

To prevent state officials from using the eleventh amendment to circumvent federal and constitutional law, the Supreme Court has lifted the bar in limited circumstances. *See generally Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104-06 (1984) (discussing conflict between eleventh

amendment and supremacy clause). Under *Ex parte Young*, 209 U.S. 123 (1908), acts of state officials that violate federal constitutional or statutory rights are deemed not to be acts of the state. Accordingly, *Young* allows actions in federal court to enjoin state officials from committing ongoing or future violations. *See Edelman v. Jordan*, 415 U.S. 651, 664 (1974). Expenses of the litigation may in some circumstances be imposed upon the state ancillary to a claim for injunctive relief. *Quern v. Jordan*, 440 U.S. 332, 344-45 (1979).

Because *Ex parte Young* was meant to balance federal supremacy and state immunity, however, the Supreme Court has carefully controlled its application. Suits against state officials that, in form or substance, seek compensatory damages (rather than prospective declaratory or injunctive relief) which will be paid with funds from the state treasury (rather than from the pockets of individual officials) remain barred. *Edelman*, 415 U.S. at 664; *see also Green v. Mansour*, 474 U.S. 64, 73 (1985) ("a declaratory judgment is not available when the result would be a partial 'end run' around our decision in *Edelman*"). In addition, suits against state officials that allege violations of valid state law do not implicate the supremacy clause and will not be heard in federal court. *Pennhurst*, 465 U.S. at 106.

On its face, the complaint in this action appears to skirt the eleventh amendment bar because it is for declaratory relief and seeks damages only from the Commissioner and Executive Deputy Commissioner personally. In cases implicating the eleventh amendment, however, district courts are required to determine the real parties in interest by examining the substance of the action and its likely effect. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 463-64 (1945). The primary goal of plaintiffs' action is not prospective injunctive relief: the events complained of have passed. Plaintiffs are asking in part for judicial review of a final agency decision that is specific only to them rather than injunctive relief from a continuing constitutional violation. *Cf. United States v. Yonkers Bd. of Educ.*, 893 F.2d 498, 503 (2d Cir. 1990) (no bar to suit alleging ongoing race

discrimination). Plaintiffs are also asking for millions of dollars in damages for the disruption of their oil transportation business. This portion of the complaint is not personal to the defendants. It concerns their official actions and the discretion granted them to act by duly enacted laws of New York. In reality, this is an action against the state for judicial relief from a state agency decision and for compensatory damages that, if successful, would be paid by the state. It is therefore barred by the eleventh amendment. *Edelman*, 415 U.S. at 666.

B. QUALIFIED IMMUNITY

Even if the suit is against the defendants in their personal capacity, they are afforded qualified immunity for violations of constitutional rights resulting from the exercise of official powers. *Butz v. Economou*, 438 U.S. 478, 499-504 (1978); *cf. Sprecher v. Graber*, 716 F.2d 968, 1976 (2d Cir. 1983). Under *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), immunity for agency officials acting within the discretion granted them by the legislature will be found unless their conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." Simply alleging, as plaintiffs do here, that the defendants acted with a malicious intention to deprive them of their rights, is no longer sufficient after *Harlow*. *See id.* at 815-17 (rejecting "subjective" component of test for qualified immunity; "bare allegations of malice should not suffice"). Since even at this stage it is not clear that any federally created rights have been violated, the defendants are entitled to immunity.

C. ABSTENTION

Dismissal is also warranted on grounds of abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

1. *Burford*

Under *Burford*, federal courts should abstain from deciding questions of state law where it would hamper the states' efforts to establish a coherent regulatory scheme on issues of importance to the state. In *Burford* itself, Sun Oil Company had challenged decisions by the Texas Railroad Commission granting Burford permission to drill several oil wells. Since federal decisions would have substantially interfered with the Commission's regulatory procedures, the Supreme Court ordered the federal suit dismissed.

In this case, New York state has a comprehensive statutory scheme and settled administrative procedures for dealing with environmental and safety violations threatening pollution of New York's waterways and beaches. We take judicial notice of the huge amount of oil and oil-related products transported in and near New York's shore lines by vessels, pipelines and vehicles. Many oil spills occur each year in the port of New York. They threaten the safety and welfare of the state's population. Closing of New York's beaches because of pollution poses risks to the health and well-being of millions of people and could prove a disaster to the state's tourist industry. Fire resulting from petroleum spills and the interruption of shipping with adverse effects on commerce, jobs and tax revenues are properly of great concern to New York state.

Deciding the state statutory and regulatory issues in this case may disrupt state efforts to create a viable statutory administrative scheme for coping with pollution of New York's waterways. Under *Burford*, dismissal is mandated as a matter of law and in the exercise of the court's discretion. *See, e.g., Onondaga Landfill Sys., Inc. v. Williams*, 624 F. Supp. 25 (N.D.N.Y. 1984) (abstention applied in case challenging constitutionality of New York Environmental Conversation Law provisions granting DEC Commissioner broad inspection powers).

2. *Pullman*

Abstention under *Pullman* is proper where a state proceeding can be brought with reasonable promptness, and a decision on an unsettled question of state law may moot the federal case. Once a court has abstained, the plaintiff must generally file a state court action and expose the federal constitutional issue so that the state court may "interpret the statute in light of the constitutional objections presented." *Government & Civic Org. Comm. v. Windsor*, 353 U.S. 364, 366 (1957).

Plaintiffs' complaint raises serious questions about New York's laws. On its face, section 71-0301 offers little guidance on when the Commissioner may act, and apparently offers none as to when and how Summary Abatement Orders are terminated. Moreover, the licensing provisions of New York's Navigation law, while empowering the Commissioner to impose fines, do not appear to explicitly authorize the Commissioner to revoke licenses as implicitly claimed in NYCRR § 30.10(b). It is precisely because these are unresolved and difficult questions of state law that abstention is appropriate. The state courts have not had occasion to provide an authoritative interpretation of these statutes. If a state court were to decide that the Commissioner exceed his statutory power, the plaintiffs' licenses would be reinstated and the federal constitutional questions avoided. *Accord Brookhaven Aggregates, Inc. v. Williams*, 23 E.R.C. 1927 (E.D.N.Y.), *aff'd*, 795 F.2d 78 (2d Cir. 1985) (motion to enjoin Summary Abatement Order denied on grounds of abstention).

D. PREEMPTION

State laws must give way to conflicting federal laws or regulations under the supremacy clause. *See generally Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2481-83 (1991). Preemption will be found if compliance with both state and federal law is impossible. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). It may also be inferred where state law inhibits conduct that federal law specifically encourages. *See, e.g., Nash v. Florida Indus.*

Comm'n, 389 U.S. 235, 239 (1967). Preemption will also occur even in the absence of any conflict between state and federal provisions if there is evidence that Congress has completely "occupied the field" in which the state seeks to regulate. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Plaintiffs have not established that Article 12 of New York's Navigation Law is preempted on any of these theories. Plaintiffs' contention that New York's summary abatement statute ought to be voided as preempted is also meritless.

Plaintiffs contend that the licensing provisions of New York Navigation Law, insofar as they provide for the safe operation of seagoing vessels, are preempted by the Ports and Waterways Safety Act of 1972 (PWSA), as amended, *see* 33 U.S.C. §§ 1221-36, and by Subtitle II of Title 46 of the United States Code (governing shipping). *See* 46 U.S.C. §§ 2101-14702. 33 U.S.C. § 1223 authorizes the Secretary of Transportation to establish rules and regulations to ensure the safe operation of vessels in port waters. Existing regulations affecting oil tankers include 33 C.F.R. § 161 (establishing vessel traffic rules for various United States ports); 33 C.F.R. § 160 (empowering Coast Guard officers to ensure safety of vessels and port waters); and 33 C.F.R. § 157 (establishing design and operation regulations for oil tankers). Federal regulations promulgated under the PWSA also specifically grant the United States Coast Guard authority to prohibit vessels from operating in United States waters if the vessels' operational records suggest that they pose an environmental threat. *See* 33 C.F.R. § 160.113. 46 U.S.C. § 3703(a) requires the Secretary of Transportation to prescribe regulations for the design, construction, maintenance, and operation of certain tanker vessels. *See* 46 C.F.R. § 30.01-30.30. Further regulations specific to oil tankers are found in 46 U.S.C. § 3703a.

There is no conflict between these federal statutes and the applicable state law. The only relevant substantive standards (i.e., standards governing the actual operation of oil-carrying vessels) in Article 12 of New York Navigation Law are contained in section 174, which sets as a condition precedent to

the issuance of an operating license that the licensee comply with state and federal plans for control of petroleum discharges and that the licensee provide the necessary equipment to prevent, contain and remove discharges of petroleum. New York Navigation Law § 174(3) & (8). (Regulations of "new vessels" sold in New York requiring "fuel oil tank vents" do not become effective until 1994 and are not implicated in the current suit. *See* New York Navigation Law § 173(2).) Plaintiffs do not maintain that these conditions conflict with, or inhibit the implementation of, federal law. In fact, they admit that the New York regulations are for the most part merely duplicative of their federal counterparts. *Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss*, at 6-7. Plaintiffs thus concede that "[t]he issue of federal preemption of New York State regulation in this area is practically moot because . . . there is little state regulation." *Id.* at 6.

Since there is no direct conflict between state and federal law, plaintiffs must rely on a claim that New York law discourages behavior whose promotion is the aim of federal law or that Congress has occupied the field of oil pollution control. Plaintiffs maintain that *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), is conclusively in its favor on these points. Contrary to plaintiffs' view, *Ray* indicates how far the Supreme Court is willing to go to allow local regulation of oil tanker activity. *See* L. Tribe, *American Constitutional Law* § 6-26, at 487 (2d ed. 1988) ("[T]he basic teaching of the [*Ray*] decision is that state pressure to act in derogation of a federal statutory scheme is not to be inferred lightly.").

Ray concerned an attempt by the State of Washington to impose restrictions on oil tankers operating in Puget Sound. The Washington statute contained three provisions. The first required tankers "enrolled in the coastwise trade" to have on board a pilot licensed by Washington state; the second established that vessels entering Puget Sound were required either to meet specific design criteria or be escorted into port by tugboats; the third provision excluded from Puget Sound any tanker in excess of certain tonnage.

The Supreme Court held that the third provision of the state statute was preempted because it directly conflicted with vessel size regulations enacted by the Secretary of Transportation pursuant to the PWSA. *Ray*, 435 U.S., at 173-75. Likewise, the Court found that the first provision of the Washington law requiring a local pilot for vessels engaged in coastwise trade was, if read literally, preempted because it conflicted with PWSA provisions governing the licensing of pilots. Nevertheless, the Court indicated that this holding was necessary only because of the overly broad language of the state statute. Insofar as the statute required local pilots for vessels only when operating in the confines of Puget Sound, the Court found no preemption. Accordingly, it reversed a lower court ruling voiding the state provision in its entirety. *Id.* at 159-60.

The Court also stretched to avoid preemption in ruling on the second provision (providing the option of meeting certain design requirements or using a tugboat escort). The design requirements were ruled preempted by regulations issued pursuant to PWSA provisions authorizing the Secretary of Transportation to establish "comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation," as well as a system of inspection to ensure compliance with these standards. *See id.* at 161. The Court nevertheless held that the second provision was saved by the fact that these preempted requirements were posed as an alternative to the tugboat escort. Since the latter provision was not preempted, the statute was deemed enforceable to the extent it imposed only the tugboat escort requirement. *Id.* at 172-73.

Plaintiffs claim that the licensing provisions of Article 12 of the New York Navigation Law are akin to the design, construction and operation requirements and the tonnage limitations invalidated in *Ray*. *Ray*, however, only invalidated state provisions where there was an actual conflict between state and federal law. Where there was no such conflict, the Court steadfastly refused to infer preemption in the field of environmental protection, an area that lies at the core of the states' police powers. *See Ray*, 435 U.S. at 157 ("[W]hen a

State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' ") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S., 218, 230 (1947)). The *Ray* Court thus emphasized:

> We do not question in the slightest the prior cases holding that enrolled and registered vessels must conform to "reasonable, nondiscriminatory conservation and environmental protection measures . . ." imposed by a State.

Id. at 164 (quoting *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 277 (1977)).

The New York licensing provisions present an even weaker case for preemption than did the provisions upheld in *Ray*. As plaintiffs themselves emphasized at oral argument, section 174's licensing scheme effectively places a tax on vessels seeking to operate in New York waters to finance oil spill cleanups. There is no evidence that such a tax discourages navigation that Congress sought to promote. Particular classes of vessels are not barred from New York harbors. The scheme does not appear to require any design or operational modifications beyond those set by federal law. The licensing system is not discriminatory against non-New Yorkers. *Long Island Oil Terminals Ass'n v. Commissioner*, 421 N.Y.S.2d 405, 407 (App. Div. 3d Dep't 1979). For all these reasons, a finding of preemption is unwarranted.

If there were any doubt as to congressional design, provisions in the Federal Water Pollution Control Act (the Clean Water Act), 33 U.S.C. §§ 1251-1387, as amended by the Oil Pollution Control Act of 1990 (OPCA), 33 U.S.C. § 2701-61, settle the issue. The original Clean Water Act specifically establishes a system of liability for the release of oil into waters that is almost identical to the provisions of Article 12. *See* 33 U.S.C. § 1321. Vessel owners and operators are subject to imprisonment, fines, and civil liability for illegal dis-

charges of oil. *Id.* § 1321(b). Section 1321(s) also allows use of the "Oil Spill Liability Trust Fund" created under the Internal Revenue Code to compensate government for cleanup costs. The Fund is financed in part from fines assessed under section 1321(b). Although section 1321 was recently modified by the passage of the OPCA, vessel owners and operators are still liable for unpermitted discharges of oil and the Fund continues to operate much as it did before. *See* 33 U.S.C. §§ 2701(32), 2702.

If Congressional plans to preempt statutes like Article 12 were to be found anywhere, it would be in these two statutes. Yet both the Clean Water Act and OPCA explicitly state the opposite. 33 U.S.C. § 1321(o)(2) reads:

> Nothing in this section shall be construed as preempting any State . . . from imposing any requirement or liability with respect to the discharge of oil . . . into any waters within such State, or with respect to any removal activities related to such discharge.

33 U.S.C. § 2718(a)(1) provides that OPCA shall not

> affect, or be construed or interpreted as preempting, the authority of any State . . . from imposing any additional liability or requirements with respect to (A) the discharge of oil or other pollution by oil within such State; or (B) any removal activities in connection with such a discharge . . . .

Far from being preempted, Title 12 of New York's Navigation Law accepts the federal government's invitation to provide additional means of enforcing the federal policy favoring clean water.

Practical considerations also favor upholding the state statutes against a claim of preemption. Plaintiffs in effect are asking the federal courts to tell New York that it may not, in the exercise of its police powers, plan against the desecration of its waters and coasts that would otherwise surely result from the high volume of oil barge traffic on the state's water-

ways. Plaintiffs would instead have the state rely entirely on distant and overextended officials in Washington, D.C. for basic environmental protections. Such an ineffective scheme is not contemplated by the federal Constitution.

If there is any potential problem with the tax imposed by Article 12 it is the burden such a tax places on interstate commerce. Yet there is no evidence indicating that the burden is unreasonable or that it exceeds the cost of policing and protecting against adverse consequences of oil transportation on New York's waterways. The *Ray* Court indicated that commerce clause challenges to environmental protection statutes should not be entertained lightly. *See Ray*, 435 U.S. at 179-80.

Plaintiffs also argue that the Summary Abatement provisions of New York Environmental Conservation Law section 71-0301 are preempted by the PWSA. This contention appears to be moot. It is not clear from the record or the text of section 71-0301 or the regulations promulgated pursuant to that provision in 6 NYCRR § 620 at what point a Summary Abatement Order ceases to have effect. Since full hearings on the validity of the initial order have been afforded as required by law, however, the only live issue seems to be the revocation of licenses under New York Navigation law.

In any event, *Ray* specifically allowed for statutes that are designed to protect the environment against imminent (or even non-imminent) harms. There is no showing of a conflict or overlap between sections 71-0301 and the PWSA because the former does not establish criteria regulating the construction and operation of vessels. As pointed out above, there is no evidence of a federal program completely occupying this field.

Plaintiffs press other objections to section 71-0301. They content that the statute is void because it delegates the power to issue Summary Abatement Orders without specifying any objective controlling criteria. Alternatively, they maintain that the hearing they obtained was inadequate because it excluded exculpatory evidence and admitted unreliable evidence.

No doubt there is considerable potential for abuse in a statute that grants an agency official as much power and discretion as does section 71-0301. The burden placed on plaintiffs by having their operations shut down has been severe. But the extent to which these burdens are the result of defective application of state laws and procedures is a question that can be and ought to be pursued in the state courts. No federal constitutional violation has been shown.

III. CONCLUSION

The case is dismissed. No costs or disbursements are assessed. Plaintiffs' claims were made in good faith. All parties and the court were operating in the murk of complex statutory and regulatory provisions. Plaintiffs have been prevented from operating their valuable oil transportation business for almost two years. They should not be further penalized by court-imposed costs.

So ordered.

Brooklyn, New York
May 19, 1992

/s/ JACK B. WEINSTEIN
Jack B. Weinstein
United States District Judge

APPENDIX C

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

APPENDIX D

N.Y. Environmental Conservation Law § 71-0301

§ 71-0301. Summary abatement

Notwithstanding any inconsistent provisions of law, whenever the commissioner finds, after investigation, that any person is causing, engaging in or maintaining a condition or activity which, in his judgment, presents an imminent danger to the health or welfare of the people of the state or results in or is likely to result in irreversible or irreparable damage to natural resources, and relates to the prevention and abatement powers of the commissioner and it therefore appears to be prejudicial to the interests of the people of the state to delay action until an opportunity for a hearing can be provided, the commissioner may, without prior hearing, order such person by notice, in writing wherever practicable or in such other form as in the commissioner's judgment will reasonably notify such person whose practices are intended to be proscribed, to discontinue, abate or alleviate such condition or activity, and thereupon such person shall immediately discontinue, abate or alleviate such condition or activity. As promptly as possible thereafter, not to exceed fifteen days, the commissioner shall provide the person an opportunity to be heard and to present proof that such condition or activity does not violate the provision of this section. The commissioner shall adopt any other appropriate rules and regulations prescribing the procedure to be followed in the issuance of such orders. Any person who violates any of the provisions of, or who fails to perform any duty imposed by this section, or any rule, regulation or order promulgated by the commissioner hereunder, shall be liable to a civil penalty of not more than twenty-five hundred dollars for each such violation and an additional penalty of not more than five hundred dollars for each day during penalty of not more than five hundred dollars for each day during which such violation continues, and, in addition thereto, such person may be enjoined from continuing such violation. Penalties and

injunctive relief provided herein shall be recoverable in an action brought by the attorney general at the request and in the name of the commissioner.

(L.1972, C. 664, § 2; amended L.1973, c. 400, § 69.)

APPENDIX E

N.Y. Environmental Conservation Law § 3-0301

§ 3-0301. General functions, powers and duties of the department and the commissioner

1. It shall be the responsibility of the department, in accordance with such existing provisions and limitations as may be elsewhere set forth in law, by and through the commissioner to carry out the environmental policy of the state set forth in section 1-0101 of this chapter. In so doing, the commissioner shall have the power to:

a. Coordinate and develop policies, planning and programs related to the environment of the state and regions thereof;

b. Promote and coordinate management of water, land, fish, wildlife and air resources to assure their protection, enhancement, provision, allocation, and balanced utilization consistent with the environmental policy of the state and take into account the cumulative impact upon all of such resources in making any determination in connection with any license, order, permit, certification or other similar action or promulgating any rule or regulation, standard or criterion;

bb. Prescribe the qualifications for operators of public sewage treatment plants;

c. Provide for the propagation, protection, and management of fish and other aquatic life and wildlife and the preservation of endangered species;

cc. Prescribe and certify the qualifications for operators of solid waste management facilities as defined in section 27-0701 of this chapter; provided, however, that the commissioner shall not require the certification of operators until the commissioner shall have identified or established programs of training within the state that satisfy such qualifications;

d. Provide for the care, custody, and control of the forest preserve;

e. Provide for the protection and management of marine and coastal resources and of wetlands, estuaries and shorelines;

f. Foster and promote sound practices for the use of agricultural land, river valleys, open land, and other areas of unique value;

g. Encourage industrial, commercial, residential and community development which provides the best usage of land areas, maximizes environmental benefits and minimizes the effects of less desirable environmental conditions;

h. Assure the preservation and enhancement of natural beauty and man-made scenic qualities;

hh. Cooperate with the division of probation and correctional alternatives by identifying appropriate worksites where persons performing community service as part of a criminal disposition may be assigned to provide cleanup and other maintenance services in order to preserve and enhance the state's natural beauty and human-made scenic qualities. Such sites may include but are not limited to the state's shorelines, beaches, parks, roadways, historic sites and other natural or human-made resources;

i. Provide for prevention and abatement of all water, land and air pollution including but not limited to that related to particulates, gases, dust, vapors, noise, radiation, odor, nutrients and heated liquids;

j. Promote control of pests and regulate the use, storage and disposal of pesticides and other chemicals which may be harmful to man, animals, plant life, or natural resources;

k. Promote control of weeds and aquatic growth, develop methods of prevention and eradication, and regulate herbicides;

l. Provide and recommend methods for the recovery, recycling and reuse; or, where recycling and reuse are not possible, the disposal of solid wastes, including domestic and industrial refuse, junk cars, litter and debris consistent with sound health, scenic, environmental quality, and land use practices;

m. Prevent pollution through the regulation of the storage, handling and transport of solids, liquids and gases which may cause or contribute to pollution;

n. Promote restoration and reclamation of degraded or despoiled areas and natural resources;

o. Encourage recycling and reuse of products to conserve resources and reduce waste products;

p. Administer properties having unique natural beauty, wilderness character, or geological, ecological or historical significance dedicated by law to the state nature and historical preserve;

q. Formulate guides for measuring presently unquantified environmental values and relationships so they may be given appropriate consideration along with social, economic, and technical considerations in decision-making;

r. Encourage and undertake scientific investigation and research on the ecological process, pollution prevention and abatement, recycling and reuse of resources, and other areas essential to understanding and achievement of the environmental policy;

s. Assess new and changing technology and development patterns to identify long-range implications for the environment and encourage alternatives which minimize adverse impact;

t. Monitor the environment to afford more effective and efficient control practices, to identify changes and conditions in ecological systems and to warn of emergency conditions;

u. Encourage activities consistent with the purposes of this chapter, by advising and assisting local governments, institutions, industries, and individuals;

v. Undertake an extensive public information and education program to inform and involve other public and private organizations and groups and the general public in the commitment to the principles and practices of environmental conservation and develop programs for the teaching by others of such principles and practices;

w. Cooperate with the executive, legislative and planning authorities of the United States, neighboring states and their municipalities and the Dominion of Canada in furtherance of the policy of this state as set forth in section 1-0101;

x. Exercise and perform such other functions, powers and duties as shall have been or may be from time to time conveyed or imposed by law, including, but not limited to, all the functions, powers and duties assigned and transferred to the department from the Department of Health, Conservation Department, Department of Agriculture and Markets, and Office for Local Government in the Executive Department by chapter 140 of the laws of 1970;

y. To prevent and control air pollution emergencies, as defined in subdivision 1 of section 1-0303 hereof. In exercising such prevention and control the department and the commissioner may limit the consumption of fuels and use of vehicles, curtail or require the cessation of industrial processes and limit or require cessation of incineration and open burning, and take any other action he may deem necessary to prevent and/or control air pollution emergencies. The department and commissioner shall adopt and implement by rule and regulation a plan designed to prevent and control such air pollution emergencies;

z. Within amounts appropriated to the department, to contract, outside the city of New York, with federally-funded nonprofit organizations that are organized for the purpose of

beautification of highways, parks and recreation areas and employ persons sixty years of age or older whose net annual income does not exceed one thousand dollars to carry out such activities. The contract shall name the organization, the amount and manner of payment for the service to be rendered, nature of such service, the rendering of a verified account of the disbursements and verified or certified vouchers therefor attached, a refund of any unused amount, and such other conditions upon the use thereof as may be deemed proper.

zz. *[Repealed.]*

2. To further assist in carrying out the policy of this state as provided in section 1-0101 of the chapter the department, by and through the commissioner, shall be authorized to:

a. With the advice and approval of the board, adopt, amend or repeal environmental standards, criteria and those rules and regulations having the force and effect of standards and criteria to carry out the purposes and provisions of this act. Upon approval by the board of any such environmental standard, criterion, rule or regulation or change thereto, it shall become effective thirty days after being filed with the Secretary of State for publication in the "Official Compilation of Codes, Rules, and Regulations of the State of New York" published pursuant to section 102 of the Executive Law. This provision shall not in any way restrict the commissioner in the exercise of any function, power or duty transferred to him and heretofore authorized to be exercised by any other department acting through its commissioner to promulgate, adopt, amend or repeal any standards, rules and regulations. No such environmental standards, criterion, rule or regulation or change thereto shall be proposed for approval unless a public hearing relating to the subject of such standard shall be held by the commissioner prior thereto not less than 30 days after date of notice therefor, any provision of law to the contrary notwithstanding. Notice shall be given by public advertisement of the date, time, place and purpose of such hearing. Members of the board shall be entitled to participate in such

hearing and opportunity to be heard by the commissioner with respect to the subject thereof shall be given to the public.

b. Enter into contracts with any person to do all things necessary or convenient to carry out the functions, powers and duties of the department.

c. Review and appraise programs and activities of state departments and agencies in light of the policy set forth in section 1-0101 of this chapter for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy and to make recommendations to such departments and agencies with respect thereto, including but not limited to, environmental guidelines for their use.

d. Consult with and co-operate with:

(1) Officials of departments and agencies of the state having duties and responsibilities concerning the environment;

(2) Officials and representatives of any public benefit corporation in the state;

(3) Officials and representatives of the federal government, of other states and of interstate agencies on problems affecting the environment of this state;

(4) Persons, organizations and groups, public and private, utilizing, served by, interested in or concerned with the environment in the state;

(5) The appropriate committee or committees of the Legislature.

e. Appear and participate in proceedings before any federal regulatory agency involving or affecting the purposes of this department.

f. Undertake any studies, inquiries, surveys or analyses it may deem relevant through the personnel of the department or in co-operation with any public or private agencies, including educational, civic and research organizations, colleges, uni-

versities, institutes or foundations, for the accomplishment of the purposes of the department.

g. Enter and inspect any property or premises for the purpose of investigating either actual or suspected sources of pollution or contamination or for the purpose of ascertaining compliance or noncompliance with any law, rule or regulation which may be promulgated pursuant to this chapter. Any information relating to secret processes or methods of manufacture shall be kept confidential.

h. Conduct investigations and hold hearings and compel the attendance of witnesses and the production of accounts, books, documents, and nondocumentary evidence by the issuance of a subpoena.

i. Advise and cooperate with municipal, county, regional and other local agencies and officials within the state, to carry out the purposes of chapter 140 of the laws of 1970.

j. Act as the official agency of the state in all matters affecting the purposes of the department under any federal laws now or hereafter to be enacted, and as the official agency of a county, town, city, village or authority in connection with the grant or advance of any federal or other funds or credits to the state or through the state to its local governing bodies for the purposes of chapter 140 of the laws of 1970.

k. Report from time to time to the Governor and make an annual report to the Governor and the Legislature.

l. Formulate and execute contracts, keep accounts, record personal data, acquire real or personal property, including acquisition by condemnation, appropriation, gift, grant, devise or bequest, adjust claims, compile statistics and engage in research opportunities; all according to the statutes or department orders and regulations in such cases made and provided.

m. Adopt such rules, regulations and procedures as may be necessary, convenient or desirable to effectuate the purposes of this chapter.

n. Study, monitor, control and regulate pollution from motor vehicle exhaust emissions.

o. When requested to do so by another state with which New York has reciprocally agreed to provide personnel and equipment, provide such personnel and equipment for use in suppression of forest fires upon lands within such other state.

p. Notwithstanding any other provision of this chapter, delegate to municipal health or environmental departments or agencies or other appropriate governmental entities including the state soil and water conservation committee and the soil and water conservation districts, any of which shall meet such qualifications relating to adequate authority, expertise, staff, funding and other matters as may be prescribed, such functions of review, approval of plans, issuance of permits, licenses, certificates or approvals required or authorized by this chapter as the commissioner may deem appropriate in order to expedite the review of matters within the jurisdiction of the department, to provide for better coordination among different levels of government or to enhance environmental protection, subject to such conditions as he may establish. The powers delegated pursuant to this part may be withdrawn by the commissioner, at any time, upon thirty days written notice to the department, agency or other governmental entity including the state soil and water conservation committee and the soil and water conservation districts holding such powers by virtue of this paragraph.

q. Require that a written instrument submitted pursuant to this chapter or a rule or regulation adopted pursuant hereto contain a form notice to the effect that false statements made therein are punishable pursuant to section 210.45 of the penal law.

r. Notwithstanding the provisions of article six of the public officers law, deny access to inspection of records which identify locations of habitats of species designated endangered pursuant to section 11-0535 of this chapter, protected pursuant to section 9-1503 of this chapter or any other species

or unique combination of species of flora or fauna where the destruction of such habitat or the removal of such species therefrom would impair their ability to survive provided, however, that the commissioner may, in his discretion permit access to such inspection to persons engaged in legitimate scientific and academic research.

s. Coordinate and conduct Arbor day ceremonies on the last Friday of April in cooperation with the department of education and the department of agriculture and markets.

t. Establish a program, in consultation with the conservation fund advisory council for the sale of limited edition prints of fish and wildlife paintings with the proceeds to be credited to the conservation fund established pursuant to section eighty-three of the state finance law.

u. Notwithstanding any other provisions of this chapter, establish a program to offer for sale to the public of items symbolic of contributions made to support department activities performed as steward of lands under its jurisdiction. The terms upon which such items will be available and the relevant donations for such items shall be set forth in regulations to be promulgated by the commissioner provided, however, that no such item shall be offered unless the amount of such donation exceeds the value of the item. All receipts of the department from such contributions shall be deposited in and separately accounted for in an account in the miscellaneous state special revenue fund, expenditures from which shall be limited to the activities of the department pursuant to this paragraph and activities performed as steward of lands under its jurisdiction.

v. Except for the forest preserve which is under the care, custody and control of the department pursuant to paragraph d of subdivision one of this section and subdivision one of section 9-0105 of this chapter, administer and manage the real property under the jurisdiction of the department for the purpose of preserving, protecting and enhancing the natural

resource value for which the property was acquired or to which it is dedicated, employing all appropriate management activities.

w. Shall prepare and submit to the federally appointed "Aquatic Nuisance Species Task Force" two comprehensive management plans, after notice and opportunity for public comment, for funding of New York state activities under the Federal Non-indigenous Aquatic Nuisance Prevention and Control Act of 1990, Public Law 101-646, by January 1, 1992. One such plan shall identify those areas or activities within the state, other than those related to public facilities, where technical and financial assistance is needed within the state to eliminate or reduce environmental, public health and safety risks and to mitigate the financial impact upon the state associated with non-indigenous aquatic species, particularly zebra mussels. The other plan shall be a "public facility management plan" which is limited solely to identifying those public facilities within the state for which technical and financial assistance is needed to reduce infestations of zebra mussels. Each plan shall identify the management practices and measures that will be undertaken to reduce infestations of aquatic nuisance species, especially zebra mussels, and include the following: (1) a description of the state and local programs for environmentally sound prevention and control of the target species; (2) a description of federal activities that may be needed for environmentally sound prevention and control of aquatic nuisance species and a description of the manner in which those activities should be coordinated with state and local government activities; and (3) a schedule for implementing the plan, including a schedule of annual objectives. In developing and implementing these management plans, the department shall, to the maximum extent practicable, involve local governments, regional entities and public and private organizations that have expertise in the control of aquatic nuisance species. Copies of these plans shall also be submitted to the temporary president of the senate and the speaker of the assembly, and the department shall annually, on

or before January first, submit to the temporary president of the senate and speaker of the assembly a report on the activities of the department under these plans.

3. The department shall not alter the boundaries of any of the nine administrative regions from the boundaries existing on January first, nineteen hundred seventy-seven without first holding public hearings in each region affected.

4. The commissioner shall cooperate with the commissioner of the state department of health, district attorneys and the department of law in providing assistance in the investigation and prosecution of violations of article twenty-seven of this chapter.

(L.1972, c. 664, § 2; amended L.1973, c. 400, §§ 1 to 3; L.1974, c. 327, § 1; L.1974, c. 469, § 1; L.1974, c. 987, § 1; L.1975, c. 96, § 1; L.1975, c. 188, § 1; L.1975, c. 274, § 1; L.1975, c. 532, § 1; L.1976, c. 400, § 1; L.1976, c. 600, § 1; L.1977, c. 158, § 1; L.1977, c. 641, § 1; L.1977, c. 722, § 4; L.1978, c. 184, § 1; L.1979, c. 137, § 1; L.1979, c. 345, § 1; L.1980, c. 126, § 1; L.1981, c. 88, § 1; L.1981, c. 156, § 1; L.1981, c. 719, § 4; L.1982, c. 84, § 1; L.1983, c. 42, § 1; L.1983, c. 965, § 2; L.1984, c. 42, § 2.)

No. 93-826

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BERMAN ENTERPRISES, INC.; GENERAL MARINE TRANSPORT CORPORATION; STANDARD MARINE SERVICES, INC.; JANE FRANK KRESCH, as Secretary of Berman Enterprises; EVELYN BERMAN FRANK, as Chief Executive Officer of General Marine Transport Corporation and as Officer of the other named corporations; and PETER M. FRANK, as President of General Marine Transport Corporation.

Petitioners,

—against—

THOMAS C. JORLING, in his individual capacity and in his official capacity as Commissioner of the New York State Department of Environmental Conservation; and Langdon Marsh, in his individual capacity and in his official capacity as Executive Deputy Commissioner of the New York State Department of Environmental Conservation.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court below was correct in concluding that federal law does not preempt New York State from taking enforcement action under its statutes which are designed to protect the environment against harms such as oil spills?

2. Whether the court below was correct in concluding that abstention is appropriate under the *Burford* and *Pullman* doctrines, where the issues raised by petitioners turn on a complex state regulatory scheme governing the prevention of pollution in its waters which has never been reviewed by the state courts?

3. Whether the court below correctly applied the test in *Harlow v. Fitzgerald* with respect to qualified immunity in holding that respondents are protected from damage suits relating to administrative orders issued or upheld by them pursuant to state statutes and regulations which have never received judicial interpretation and therefore are not clearly established law?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-826

BERMAN ENTERPRISES, INC.; GENERAL MARINE TRANSPORT CORPORATION; STANDARD MARINE SERVICES, INC.; JANE FRANK KRESCH, as Secretary of Berman Enterprises; EVELYN BERMAN FRANK, as Chief Executive Officer of General Marine Transport Corporation and as Officer of the other named corporations; and PETER M. FRANK, as President of General Marine Transport Corporation.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondents, Thomas C. Jorling, Commissioner of the New York State Department of Environmental Conservation, and

Langdon Marsh, Executive Deputy Commissioner of the New York State Department of Environmental Conservation, respectfully submit this brief in opposition to the petition for certiorari. The petition should be denied because the circuit court correctly applied the decisions of this Court, the petition does not present a conflict among the courts of appeals, and does not raise an important federal question which should be settled by this Court.

STATEMENT OF THE CASE

Prior to October 18, 1990, the petitioners, Berman Enterprises and several related corporations and their officers, operated oil tanker barges, sludge barges, and other vessels in New York harbor. On September 27, 1990, one of their tanker barges, the Sarah Frank, sank in the Arthur Kill, spilling oil and sludge into New York waters. (Pet. App. A, p. 3a).[1] Even before the sinking of the Sarah Frank, Berman Enterprises and its related companies (hereinafter, "Berman") had a long history of environmental violations in the New York Harbor area. (Opp. App.[2] A, p. 11a-12a).[3] On October 18, 1990, Thomas Jorling, Commissioner of the New York State Department of Environmental Conservation ("DEC") issued a Summary

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[1] References to the Appendix to the Petition for Certiorari are cited as (Pet. App. ___, p. ___a).

[2] Petitioners failed to include either Commissioner Jorling's Summary Abatement Order or Deputy Commissioner Marsh's Decision and Order in the Appendix to their Petition as required by Rule 14 of the Rules of this Court. Respondents have therefore included those orders as well as New York's Navigation Law ("Nav.L.") Section 174 and 17 New York Code of Rules and Regulations ("N.Y.C.R.R.") Section 30.10, both of which are relevant to this case. References to these documents are cited as (Opp.App. ___, p. ___a).

[3] The district court noted in its opinion dismissing petitioners' action, "[t]estimony and court records indicated that plaintiffs had repeatedly illegally dumped waste materials, operated unlicensed vessels, and withheld material information in obtaining operating licenses." (Pet. App. B, p.18a).

Abatement Order pursuant to Environmental Conservation Law ("ECL") § 71-0301 and Navigation Law ("Nav.L.") § 174, which concluded that

> . . . continued operation of this fleet in New York waters is likely to result in additional unreported oil, toxic wastewater, or sewage sludge discharges . . . which would irreversibly or irreparably damage the natural resources of the marine district. These same facts and circumstances are likely to cause other petroleum-related explosions, constituting an imminent danger to the health and welfare of vessel crews and others who find themselves on the waters of the marine district, and rendering additional environmental harm likely. (Opp. App. A, p. 12).

The order 1) immediately suspended the petroleum facility licenses for 14 of the Berman barges, 2) required Berman to empty all cargo from its barges, and 3) ordered that the barges remain docked and not operate in the New York marine district. (Pet. App. A, p. 3a). Under the terms of the Summary Abatement Order, an administrative hearing was scheduled within 15 days as required by New York law to address the merits of the Order. (Pet. App. A, p. 4a).

That same month, Berman commenced a civil action in the United States District Court for the Southern District of New York, seeking a temporary restraining order and preliminary injunction, arguing that New York was preempted from issuing its Summary Abatement Order. *Berman v. Jorling*, 90 Civ. 6848 (JES) (SDNY). After a full evidentiary hearing, the court denied Berman's motion, concluding that New York was not preempted from enforcing its environmental laws and that Berman had no likelihood of success on the merits. (Pet. App. A, p. 4a).

The administrative hearing therefore proceeded and the administrative law judge, in a 59 page opinion based on one month of testimony, recommended that:

1) The 14 major-facility licenses that had been suspended be revoked;

2) The summary abatement order issued by Jorling be continued without modification;

3) Modifications proposed by the staff to allow for limited operation of the barges be rejected; and,

4) The summary abatement order not be broadened to incorporate four other barges owned by Berman because those barges were not named in the order, and the request to incorporate them was made after the evidentiary record was closed. (Pet. App. A, p. 5a).

The report of the administrative law judge was reviewed by Langdon Marsh, Executive Deputy Commissioner of DEC,[4] who issued the final Decision and Order on March 25, 1991. He found, *inter alia*, that over the previous eleven years the fourteen Berman vessels that were subject of the Summary Abatement Order had " '. . . compiled records of chronic noncompliance with state and federal regulations which are designed to protect the environment, public health and safety . . .' " (Pet. App. A, p. 6a) and confirmed the recommendations of the administrative law judge. (Pet. App. A, p. 7a).

In August 1991, with the Southern District action still pending, petitioners filed this case in the Eastern District of New York, again claiming the Summary Abatement Order was preempted by federal law, and challenging Marsh's order as well. The new case sought declaratory and injunctive relief and damages against Commissioner Jorling and Executive Deputy Commissioner Marsh for alleged substantive and procedural due process violations in connection with the Sum-

[4] As indicated in the opinion of the court below, the Commissioner of DEC recused himself from further participation in the case, (Pet. App. A., p. 5a), although contrary to petitioners' assertion, (Pet., p. 3) there is no evidence in the record indicating the reason for the Commissioner's withdrawal.

mary Abatement Order and final Decision and Order. The complaint also alleged that the orders violated the supremacy clause and were arbitrary and capricious and not based upon substantial evidence under state law. (Pet. App. A, p. 7a).

On November 6, 1991, the Southern District action was dismissed by stipulation of the parties.[5]

On May 19, 1992, United States District Judge Jack B. Weinstein dismissed the Eastern District case. On August 24, 1993, the United States Court of Appeals for the Second Circuit upheld Judge Weinstein's decision in its entirety. Without further discussion, the Court of Appeals adopted the District Court's conclusion, which was based on a lengthy examination of the preemption doctrine, that New York is not preempted from regulating the Berman barges in New York waters. (Pet. App. A, p. 3a). With respect to petitioners' damage claims, the Court of Appeals agreed with the District Court that insofar as the claims were really against the State of New York, they were barred by the Eleventh Amendment, (Pet. App. A, p. 8a-9a), and also agreed that even if the claims were against the officials in their personal capacity, the officials were entitled to qualified immunity. (Pet. App. A, p.11a-12a). The Court further held that abstention was appropriate under the doctrines established in both *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) and *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) and that the remaining questions involving state law could be pursued in the state courts.

[5] The Court of Appeals mistakenly stated that the Southern District action was discontinued seven days after the Southern District (Sprizzo, J.) denied Berman's motion for a preliminary injunction. (Pet. App. A, p. 4a). In fact, petitioners continued that case for a full year after Judge Sprizzo's decision, and for approximately three months after they filed this case in the Eastern District of New York. (Pet. App. B, p. 18a).

REASONS FOR DENYING THE WRIT

A. The Court Of Appeals Correctly Decided That New York State Is Not Preempted From Regulating Barges In The Waters Of The State.

This Court has held that "when a State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Ray v. Atlantic Richfield*, 435 U.S. 151, 157 (1978) (citations omitted). Federal law may, however, preempt state law in three circumstances.

First, Congress may preempt state law by an express statement of preemption. *Pacific Gas and Elec. v. State Energy Resources Conservation and Dev. Com'n*, 461 U.S. 190, 203 (1983). Second, even when not explicit, preemption can be implied where there is "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it," because Congress intended to dominate the field. *Pacific Gas and Elec.*, 461 U.S. at 203 [quoting *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)]; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Third, even where Congress does not intend to displace the states, state law may be preempted where compliance with both state and federal law is "a physical impossibility," *Pacific Gas and Elec.*, 461 U.S. at 204 [quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)], or where "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Pacific Gas and Elec.*, 461 U.S. at 204 [quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941)]. Here none of the prerequisites for preemption are met.

Petitioners have not cited any statute which explicitly preempts New York from exercising its environmental authority in New York waters, because there is none. Nor is there any

direct conflict between federal and state law with respect to New York's environmental authority. Therefore the only potential remaining basis for preemption is that Congress intended to occupy the field. Relying on this Court's opinion in *Ray*, petitioners contend that Congress intended the Coast Guard to be the sole agency regulating the Berman vessels. Petitioners' reliance on *Ray* is misplaced. In *Ray*, which dealt with the constitutionality of Washington State laws governing the design, size, and movement of oil tankers which operate in Puget Sound, this Court distinguished between regulations governing the design and construction of vessels, which are controlled by the Coast Guard so that the Nation can "speak with one voice with respect to tanker design standards," 435 U.S. at 166, and state laws and regulations which protect the state's environment, which are not preempted by federal law. As this Court stated in *Ray*,

> We do not question in the slightest prior cases holding that enrolled and registered vessels must conform to "reasonable, nondiscriminatory conservation and environmental protection measures . . ." imposed by a State. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), citing *Smith v. Maryland*, 18 How. 71 (1855); *Manchester v. Massachusetts*, 139 U.S. 240 (1891); and *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960). Similarly, the mere fact that a vessel has been inspected and found to comply with the Secretary's vessel safety regulations does not prevent a State or city from enforcing local laws having other purposes, such as a local smoke abatement law. *Ibid.*

435 U.S. at 164. Thus in *Ray*, although this Court found some provisions of Washington law to be in direct conflict with federal law and invalidated them, it upheld other provisions of state law that did not directly conflict with federal law.

Here, neither the Summary Abatement Order nor the final Order purport to determine whether individual vessels meet Coast Guard minimum design and construction standards. Rather, both orders are concerned with the operation of the

vessels and their "adverse environmental impact in the New York Harbor area." (Opp. App. B, p. 1a). This is exactly the area Congress has explicitly preserved to state authority—regulation to prevent pollution of a state's waterways. If Congress had intended to preempt New York's Navigation and Environmental Conservation Laws it would most likely have done so in the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, or the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701 *et seq.* To the contrary, both statutes expressly reserve the rights of the states to impose their own requirements and liabilities with respect to the discharge of oil or other pollution within the state. *See*, 33 U.S.C. § 1321(o)(2) and 33 U.S.C. § 2718(a)(1).

B. The Court Of Appeals' Decision Is Consistent With This Court's Decision in *Harlow v. Fitzgerald* And Does Not Conflict With The Decisions Of Other Courts Of Appeals.

In holding that both Commissioner Jorling and Executive Deputy Commissioner Marsh are protected with respect to their actions in issuing the Summary Abatement Order and final Order, the Court of Appeals simply applied well-established law. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).[6] In *Harlow*, this Court held that to penetrate the shield of immunity which protects government officials performing discretionary acts, a plaintiff must establish two things; first, that the government official had violated clearly established law, and second, that a reasonable person would have known that the law had been violated. *Harlow*, 457 U.S. at 818-19. Petitioners argue that the Court of Appeals applied *Harlow* incorrectly because it never discussed the reasonable person prong

[6] Respondents argued below that they were entitled to absolute immunity as well, since the functions for which they were sued were quasi-judicial or judicial in nature. *See*, *Harlow*, 457 U.S. at 810-11. The Court of Appeals did not reach the question of absolute immunity, since it concluded that respondents' acts were fully protected by qualified immunity.

of the test. Under *Harlow*, however, qualified immunity is not overcome unless both prongs of the test are satisfied. Having concluded that the first prong had not been met, *i.e.*, the issuance of the Summary Abatement Order and the final Order did not violate any clearly established law, it was therefore not necessary for the court to reach the second prong.[7]

Commissioner Jorling, according to the Court of Appeals, clearly had the authority under ECL § 71-0301 to issue a Summary Abatement Order without a prior hearing.[8] Executive Deputy Commissioner Marsh acted on the basis of a lengthy administrative hearing record. Both orders, according to the court, were at least superficially authorized by Section 174 of the Navigation Law and by 17 N.Y.C.R.R. § 30.10 governing vessel licensing and revocation. (Pet. App. A, p. 10a). Therefore, even if, as petitioners contend, Commissioner Jorling and Executive Deputy Commissioner Marsh went too far in the exercise of their authority, the Court of Appeals was

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[7] The Court of Appeals correctly concluded that the Summary Abatement Order and the revocation of vessel licenses were authorized pursuant to ECL § 71-0301; 6 N.Y.C.R.R. § 622.14(a); and Nav. L. § 174; 17 N.Y.C.R.R. § 30.10, respectively.

[8] ECL 71-0301 provides in part:

> Notwithstanding any inconsistent provisions of law, whenever the commissioner finds, after investigation, that any person is causing, engaging in or maintaining a condition or activity which, in his judgement, presents an imminent danger to the health or welfare of the people of the state or results in or is likely to result in irreversible or irreparable damage to natural resources, and relates to the prevention and abatement power of the commissioner and it therefore appears to be prejudicial to the interests of the people of the state to delay action until an opportunity for a hearing can be provided, the commissioner may *without prior hearing*, order such person by notice, in writing where practicable or in such other form as in the commissioner's judgment will reasonably notify such person whose practices are intended to be proscribed, to discontinue, abate or alleviate such condition or activity, and thereupon such person shall immediately discontinue, abate or alleviate such condition or activity. (emphasis supplied).

correct in concluding that "nothing the defendants did is expressly prohibited under state law." (Pet. App. A, p.10a). Moreover, as the Court of Appeals noted, those claims regarding respondents' exercise of their authority raise " 'unresolved and difficult questions of state law' of which 'the state courts have not had occasion to provide an authoritative interpretation' ". (Pet. App. A., p.10a-11a). Since no action of either official violated "clearly established law," it was not necessary for the Court of Appeals to reach the second prong of the *Harlow* test, and the court correctly concluded that respondents were entitled to qualified immunity.[9]

[9] The application of *Harlow* by the Court of Appeals is completely consistent with the cases petitioners cited in support of their claim that this Court's immunity test was misapplied. Those circuits did not, as petitioners claim, apply both prongs of the test in all circumstances. Only where they found a violation of clearly established law, did the courts go on to consider the question of reasonable knowledge. When the law allegedly violated was not clear, the defendant officials retained the protection of qualified immunity without any inquiry into their reasonable knowledge. So, in *Chapman v. Nichols*, 989 F.2d 393 (10th Cir. 1993) because the court found the law governing strip searches to be clearly established, it went on to consider whether an objectively reasonable officer could have believed his conduct to be legally acceptable. In *Walters v. Grossheim*, 990 F.2d 381 (8th Cir. 1993) *only* the question of reasonable knowledge was explored by the Court because the prison officials being sued had directly violated an unstayed judgment of a state court and therefore there was no question of whether the law was clearly established. Under the circumstances, the only question considered was whether a reasonably competent official should know that it is not lawful to disobey a final and nonappealable court order. 990 F.2d at 384. In contrast, in both *Cronen v. Texas Dept. of Human Services*, 977 F.2d 934 (5th Cir. 1992) and *Long v. Norris*, 929 F.2d 1111 (6th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 187 (1991), with respect to those causes of action where the courts held that no clearly established law had been violated, they did not consider the question of reasonable knowledge. For example, in *Cronen*, having found that denial of the plaintiff's claims for shelter cost deductions did not violate clearly established rights, the court upheld the grant of qualified immunity, stating "we express no opinion of the reasonableness of defendant's interpretation but hold only that neither of these regulations, nor any other authority, clearly establishes Cronen's right to the shelter cost

C. The Court of Appeals Properly Applied Both *Burford* and *Pullman* Abstention In Dismissing This Case.

1. *Burford* abstention

Under the doctrine established by this Court in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), federal courts will abstain from interfering with specialized regulatory schemes, especially where the state law issues concern "problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 814 (1976), explaining *Burford* abstention.

The Court of Appeals was correct in concluding that *Burford* abstention requires the dismissal of this case, because as the court noted, Congress has given the states "considerable leeway in protecting the purity of their own waterway." (Pet. App. A, p. 13a). *See*, Federal Water Pollution Control Act, 33 U.S.C. § 1321(o)(2); Oil Pollution Act of 1990, 33 U.S.C. § 2718(a)(1). The State of New York has so acted to protect its waterways pursuant to its Navigation and Environmental Conservation Laws.

Petitioners argue, however, that *Burford* abstention is nonetheless inappropriate, claiming that neither the Summary Abatement Order nor the final Decision and Order alleged or found violations of state law by the Berman companies. In fact, both orders refer to specific violations of state law governing the discharge of oil. *See*, *inter alia*, Summary Abatement Order: failure to report oil spills to DEC as required by

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deductions." 977 F.2d at 940. With respect to income averaging, however, the court found a violation of a clearly established right, so it went on to consider reasonable knowledge. *Ibid. See also, Long*, where the Court of Appeals held that prison officials were protected by qualified immunity from the plaintiffs' cause of action based on free association of prisoners, without considering the question of reasonable knowledge, because the court found no such clearly established associational right. 929 F.2d at 1118.

Nav.L. § 175[10] (Opp. App. A., p. 3a); failure to report changes in design, construction, operation or maintenance of their barges as required by 17 N.Y.C.R.R. § 30.6(c) (Opp. App. A, p.5a); *See also, inter alia*, Decision and Order, chronic non-compliance with state and federal regulations designed to protect the environment and public health and safety (Opp. App. B, p. 18a); failure to report changes to the vessels' design, construction, operation or maintenance which would materially affect the potential for a petroleum discharge in violation of 17 N.Y.C.R.R. § 30.6(c)(3) (Opp. App. B, p. 23a); problems of compliance with state law after licenses were issued to the Berman vessels (Opp. App. B, p. 23a).

Petitioners' additional claim, that the Court below failed to identify ". . . any comprehensive scheme or settled administrative procedures that are relevant to this case," is equally mistaken. (Pet., p. 9). Citing only ECL § 71-0301 and § 3-0301, petitioners argue that these statutes are simple, and not part of a complex regulatory scheme requiring abstention. As the Court of Appeals recognized, however, the ECL provisions cited by petitioners are only one part of the statutory scheme established by the State Legislature to protect the environmental quality of New York's waterways. The Navigation Law and regulations promulgated pursuant thereto constitute the balance of the scheme.[11] It is just such a state

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[10] Releasing oil in New York waters is itself a violation of state law. Nav. L. § 173 and ECL § 17-0503.

[11] Petitioners have consistently and inexplicably ignored the Navigation Law provisions and regulations governing oil spill prevention and control pursuant to which the Summary Abatement Order and Decision and Order were issued, and failed to include them in their appendix of relevant statutes as required by Rule 14 of this Court. The Navigation Law and regulations are, however, a significant part of the statutory scheme which New York has developed to prevent pollution of its waterways.

regulatory scheme that *Burford* abstention was designed to protect.[12]

2. *Pullman* abstention

Under principles articulated by this Court in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), federal courts will abstain

> when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal questions and "needless friction with state policies. . . ."

Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 236 (1984), quoting *Pullman*, 312 U.S. at 500.

There are "three essential conditions" for invoking *Pullman* abstention: "(1) that the state statute be unclear or the issues of state law be uncertain, (2) that resolution of the federal issue depend upon the interpretation to be given to the state law, and (3) that the state law be susceptible of an interpretation that would avoid or modify the federal issue." *Winters v. Lavine*, 574 F.2d 46 (2d Cir. 1978), citing *McRedmond v. Wilson*, 533 F.2d 757, 761 (2d Cir. 1976).

The Court of Appeals noted in its discussion of the preemption issue that New York state courts have not yet interpreted the provisions of the ECL and Navigation Law pursuant to which the challenged orders were issued. (Pet. App. A, p.10a-11a). Those provisions, according to the court, are "a complex, even bewildering, system for regulating such matters as oil and sewage pollution." (Pet. App. B., p. 13a).

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[12] The District Court, in its discussion of *Burford* abstention, took judicial notice of both the huge amount of oil and oil related products transported in New York's waterways, and the many oil spills which occur each year in those waterways, threatening health, safety, and the environment. (Pet. App. B, p. 22a).

Furthermore, decisive issues in the case turn on the interpretation of those state laws and regulations, (*Ibid.*) and determination of those issues could avoid the necessity of a federal determination. (*Id.* at 12a). Therefore this case satisfies the conditions for *Pullman* abstention.

Nonetheless, petitioners contend that *Pullman* abstention is not appropriate because they have alleged civil rights violations, citing numerous cases for the proposition that abstention is disfavored in actions brought under 42 U.S.C. § 1983. Mere claims of general civil rights violations are not, however, sufficient to justify rejection of *Pullman* abstention. Moreover, petitioners have overstated the principle regarding civil rights cases on which they rely to oppose abstention and claimed differences among the circuits where none exist.

For example, petitioners cite *Mayor of City of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974) for the proposition that abstention is disfavored in all § 1983 cases. This Court's statement that ". . . abstention is not favored in an *equal protection*, civil rights case . . .," 415 U.S. at 628 (emphasis supplied), was, however, considerably narrower than the principle espoused by petitioners, and was made where the central issue before the court was whether there had been racial discrimination in violation of the Fourteenth Amendment, and where the state issue was "insubstantial" and had been abandoned by the parties. *Id.* at 629. [13]

Nor do the circuit court cases cited by petitioners actually demonstrate "differences" among the circuits in their appli-

[13] *Zwickler v. Koota*, 389 U.S. 241 (1967), also relied on by petitioners, is inapposite. It involved the appropriateness of enjoining a state criminal prosecution brought under a statute which was allegedly violative of the First Amendment. Notably, this Court indicated in *Zwickler* that *Pullman* abstention *is* appropriate where, as here, a state statute which has been challenged is susceptible of a construction by state courts which would avoid or modify the constitutional question.

cation of the principles of *Pullman* abstention.[14] In *Conover v. Montemuro*, 477 F.2d 1073 (3rd Cir. 1973), the Third Circuit did not, as petitioners claim, state that abstention was not warranted in § 1983 cases. (Pet., p. 11). Rather, the *Conover* court stated that prior resort to state courts was "not *required*" in an action brought under the Federal Civil Rights Act, that is, there is no doctrine of exhaustion of state remedies where federal court jurisdiction has been invoked pursuant to 28 U.S.C. § 1343. 477 F.2d at 1079 (emphasis supplied). Moreover, as the Third Circuit indicated, the district court in *Conover* did not even consider *Pullman* abstention, perhaps because no construction of state law would have avoided the constitutional claim. *Id.* at 1081.

Similarly, application of the principles of *Pullman* abstention in *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973) are consistent with holdings of this Court and the ruling of the Second Circuit in this case. In *Palmer*, the court indicated that where the state remedy available to the plaintiffs was a purely discretionary one, it was not inappropriate for the district court to exercise its discretion to reject the use of the abstention doctrine.[15] 479 F.2d at 170. In *Canton v. Spokane School District #81*, 498 F.2d 840 (9th Cir. 1974), although the court, quoting the Second Circuit case of *Wright v. McMann*, 387 F.2d 519, 525 (2d Cir. 1967), stated that "cases involving vital questions of civil rights are the

[14] Furthermore, mere "differences" in the application of a legal principle to the facts of individual cases do not rise to the level of "conflict" in the circuits under Rule 10 of this Court.

[15] The other two Sixth Circuit cases relied on by petitioners are completely inapposite as no party even relied on the *Pullman* doctrine. *See, Hanna v. Toner*, 630 F.2d 442, 446 (6th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981), and *Crawley v. Hamilton County Com'rs*, 744 F.2d 28 (6th Cir. 1984). Furthermore, in discussing cases which are particularly appropriate for federal, rather than state treatment, the courts were not discussing general civil rights cases as petitioners claim, but rather spoke of cases dealing with conditions of confinement in adult and juvenile detention facilities.

least likely candidates for abstention," 498 F.2d at 846, and rejected abstention, it did so only because there was no ". . . doubtful issue of state law which, if authoritatively resolved by the state courts, would dispose of the constitutional claims presented." *Ibid.* Here, by contrast, the orders challenged by petitioners turn on matters of state law which have never been addressed by the state courts. Thus, the ruling of the Second Circuit is completely consistent with the approaches of the Third, Sixth, and Ninth Circuits.

Petitioners' additional claim, that the decision by the Court of Appeals to dismiss this case based upon *Pullman* abstention creates a conflict with the decisions of this Court and those of other circuits, is also meritless. As the Court of Appeals recognized, although dismissal is not normally appropriate in the case of *Pullman* abstention, it was appropriate here because after the state courts act, no federal matters will remain to be heard by the federal courts. (Pet. App. A, p. 12a). To the extent that petitioners are seeking damages against Commissioner Jorling and Executive Deputy Commissioner Marsh, their claims are defeated by qualified immunity. (*Ibid.*). Petitioners' claims for declaratory and injunctive relief involve the authority of the commissioners to issue their respective orders, which turns on the interpretation of state law and regulations. If the state court determines that the commissioners acted within their authority, petitioners' constitutional claims would fail. If the state court holds that state authority had been exceeded, then petitioners would be able to obtain the declaratory and injunctive relief they seek in the state forum. In either case, no issues would remain for the federal courts. Therefore, dismissal was appropriate. (Pet. App. A, p.12a-13a).

Nor does application of the abstention doctrine deprive petitioners of their only avenue of redress as they claim in their conclusion. (Pet. p. 22). Review of administrative agency orders is available in state court pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR"). Indeed, the Second Circuit explicitly warned petitioners that if they are

to avail themselves of those state procedures they must move promptly—"perhaps even before the mandate is issued from [the] Court." (Pet. App. A, p. 13a). Failure of petitioners to utilize available state court remedies does not, however, justify the rejection by the federal courts of the longstanding principles of abstention.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
December 20, 1993

Respectfully submitted,

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APPENDICES

APPENDIX A

SUMMARY ABATEMENT ORDER
DEC Case No.

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the New York State Environmental Conservation Law ("ECL"), Article 12 of the New York State Navigation Law ("NL"), and Titles 6 and 17 of the New York Codes, Rules and Regulations ("NYCRR")

—BY—

Berman Enterprises, Inc.
555 Madison Avenue
New York, N.Y. 10022,

General Marine Transport Corporation
1 Ingram Avenue
Bayonne, N.J. 07002,

Standard Marine Services, Inc.
1 Ingram Avenue
Bayonne, N.J. 07002,

Jane Frank Kresch, as Secretary of Berman Enterprises,

Evelyn Berman Frank, as Chief Executive Officer of General Marine Transport Corp. and an officer of the other named corporations,

Peter Frank, as President of General Marine Transport Corporation,

Respondents.

INTRODUCTION*

On September 27, 1990, the Tank Barge "SARAH FRANK" sank in shallow water at the First Marine Shipyard in the Arthur Kill, Staten Island. Although the U.S. Coast Guard had withdrawn the SARAH FRANK's Certificate of Inspection on August 8, 1989, rendering the vessel inoperable under New York State and Federal laws, the SARAH FRANK continued to haul petroleum products. Thus, when this vessel sank last month it spilled roughly 50,000 gallons of Number 2 Heating Oil into the fragile marine ecosystem of the Kill Van Kull.

The loss of the SARAH FRANK represents no isolated incident in the operating history of its owners, the named corporate respondents. Indeed, just this February, respondents lost the motorized vessel TUG EVELYN, spilling 5,000 or more gallons of diesel fuel upon the Staten Island shoreline. Respondents never reported this spill to the Coast Guard or to DEC.

Overall, these corporations, which own and/or operate at least 19 tank barges in New York waters, have compiled an unabated record of significant violations of federal and state laws designed to preserve minimum standards of care. At present, 8 of their 19 known tank barges lack Coast Guard certificates of inspection; 5 others have been cited by the Coast Guard for failure to complete required midterm inspections.

Respondents unlawfully failed to list these shortcomings when they applied to DEC for the petroleum-bearing vessel licenses which are required pursuant to the State Navigation Law. Additionally, respondents own/operate at least two barges which carry petroleum products and lack the necessary DEC licenses.

The operation of such chronically-underinspected barges has led to two separate fatal accidents due to petroleum explosions since 1980, and two more similar accidents in which fire seriously injured a member of the crew.

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* Appendices to the Summary Abatement Order have not been reprinted by respondents.

In the past seven years, these barges have been involved in three groundings, nine known oil spills, two collisions, and twenty one separate enforcement cases in which the Coast Guard assessed penalties for violations of federal regulations designed to assure vessel safety. Respondents also did not report the oil spills in question to DEC, as required by Navigation Law ("NL") Section 175.

Moreover, respondents have not only failed to maintain the tank barges in question, they have consciously operated them with the intent of violating applicable environmental laws and degrading the marine environment in order to decrease operating costs.

Specifically, respondents Evelyn Berman Frank and General Marine Transport Corporation recently offered criminal pleas of guilty in New Jersey Superior Court, admitting that they illegally directed several of the barges referred to above to discharge sewage sludge in the waters off Brooklyn, N.Y., and Newark, New Jersey. They then told the municipalities which had hired them to haul this noxious material that they had taken it, as promised, to the authorized dumping point 106 miles off the New York/New Jersey coast. Sentencing of respondents Frank and General Marine for these crimes is expected later this year.

Respondents also failed to pay civil penalties assessed by the Coast Guard for numerous separate violations of federal regulations in connection with their barge operations. This refusal forced the U.S. Attorney to commence a recovery proceeding to collect over twenty separate unpaid administrative judgments.

Finally, Standard Tank Cleaning Corporation, a related company which services the tank barges referred to above, was found liable in August 1990 for violating its New Jersey State wastewater discharge permit by discharging illegal concentrations of various pollutants. Standard Tank was then enjoined by the New Jersey Superior Court from continuing such polluting discharges.

* * * *

NOW, As Commissioner of the Department of Environmental Conservation, having reviewed respondents' unabated record of deliberately-illegal conduct and damage to human health and the natural environment, I make the following findings of fact and conclusions regarding the further operation of the barges listed on appendix 1 to this Order:

1. Respondent Berman Enterprises, Inc. ("Berman") is the owner of no fewer than 14 tank barges, which currently hold DEC operating licenses as specified in Appendix A. Respondent Jane Frank Kresch ("Kresch") is Berman's corporate Secretary. Upon information and belief, respondents General Marine Transport Corporation ("General") and Standard Marine Services, Inc. ("Standard") are corporate alter egos of Berman. General and Standard also own and/or operate certain additional tank barges listed in Appendix A, but not licensed by DEC. Respondents Evelyn Berman Frank ("Evelyn Frank") and Peter Frank are, respectively, Chief Executive Officer and President of General. Evelyn Frank is also an officer of Berman and Standard.

The Renewal of Respondents' Tank Barge Licenses

2. On or around December 13, 1989, Berman applied for renewal of licenses required, pursuant to NL Section 174, for the operation of all tank barges involved in the bulk storage and transfer of petroleum. These applications covered 14 vessels owned by Berman, which are listed by license number in Appendix 1.

3. A copy of each renewal application, signed by respondent Kresch on Berman's behalf, is annexed as collective Appendix 2. Every one of these fourteen applications states that the subject vessel has not been cited by the Coast Guard for any uncorrected violations of federal law or regulation. *Id.*

4. Based on the representations made by Kresch and Berman in the 14 applications in Appendix 2, DEC issued one-year renewal licenses to each vessel on March 23, 1990. A copy of each license is included in Appendix 3.

5. 17 NYCRR Section 30.6(c) states that, as a general condition of all such licenses, the operator shall promptly notify DEC of any changes in the "design, construction, operation or maintenance" of the facility in question. DEC has not received notice of any such change since the licenses were issued in March 1990, despite the fact that significant changes described in paragraphs 6 through 19 have occurred. In addition, respondents also own/operate at least two petroleum transfer barges without any valid DEC licenses (the BARGE 2010 and the LEO FRANK).

Federal Inspection Requirement Violations By Respondents' Vessels

6. Of the fourteen vessels licensed to respondents, and the five others DEC is aware respondents operate in New York waters, eight currently do not comply with federal law requiring certificates of inspection ("COI") (*see* 46 U.S.C. Section 3713(b)(3)). Five others have recently violated federal requirements that the owner perform a midterm inspection of the vessel, after it has been certified, to confirm its seaworthiness (*see* 46 U.S.C. 3308(1)).

7. Respondents turned in their COI for the JODIE K (DEC License # 0-0448) in December 1989 after that vessel suffered a transverse structural failure of its main cargo deck due to improper cargo loading by an unauthorized bargeman. These facts, and respondents' stated intention not to recertify the JODIE K, are attested to in the Coast Guard Inspection Report attached as Appendix 4.

8. The SARAH FRANK (DEC Lic. # 0-0449) lost its COI by expiration on August 8, 1989 (*see* Appendix 5), over one year before it sank and spilled tens of thousands of gallons of oil into the Kill Van Kull.

9. The LINDSEY FRANK II (DEC Lic. # 0-0658) lost its COI by expiration on September 19, 1990 (*see* Appendix 6). This vessel also suffered an explosion and fire on June 8,

1984, in which one crew member was burned to death. The Coast Guard found that, at the time of the explosion, the vessel was not properly ventilated (this was cited by the Coast Guard as a possible cause of the explosion), and was incidentally not properly manned and had missed a required drydock inspection. *See* Inspection Report at Appendix 7.

10. The NATHAN BERMAN (DEC Lic. #0-0696) lost its COI by expiration on January 15, 1989 (*see* Appendix 8), although inspection at the time of the SARAH FRANK sinking indicated it is still hauling petroleum products, despite respondent's statement to the Coast Guard that the vessel was product-free on May 11, 1990. *see* Inspection Report at Appendix 9, pages 2, 3.

11. The NEW ENGLAND 29 lost its COI by expiration on October 11, 1989. *see* Appendix 10.

12. The NEW YORK 30 will lose its COI by expiration on November 10, 1990 (*see* Appendix 11), and respondents have failed to seek recertification at least 30 days prior to expiration, as required by Coast Guard Regulation 46 C.F.R. Section 2.01-3. The Coast Guard also initiated an investigation against the NEW YORK 30 after it ran aground in April 1990. *Id.*

13. Upon information and belief, respondents also own and/or operate in New York waters three other tank barges that are neither licensed by DEC nor certified as seaworthy by the Coast Guard. These are the BARGE 2010, the REBECCA K., and the CYNTHIA M.

14. The BARGE 2010 lost its COI by expiration on April 19, 1990 (*see* Appendix 12). While the Inspection Report attached as Appendix L indicates serious structural problems were to be repaired before the BARGE 2010 was recertified, recent inspections made in connection with the loss of the SARAH FRANK indicate that the vessel is nevertheless currently loaded with petroleum, even though it was never recertified.

15. The REBECCA K., operated by Sludge Tank Cleaning Corporation, a company related to respondents, upon information and belief, by common management and ownership, lost its COI by expiration on December 6, 1986. *See* Appendix 13. Although the vessel was to be deactivated after its decertification (*id.*), upon operation and belief, it continues to operate.

16. The CYNTHIA M., owned by respondent General, lost its COI by expiration on June 21, 1990. *See* Appendix 14. Nonetheless, the New Jersey Attorney General's office discovered through surveillance that the CYNTHIA M. was still operating in 1987 and 1988, and was illegally discharging sewage sludge and acidic wastewater into New York and New Jersey territorial waters. General offered a plea of guilty in New Jersey Superior court to charges brought by the NJ Attorney General in connection with the Cynthia M.'s actions.

17. At least five other vessels owned and/or operated by respondents failed to satisfy Coast Guard requirements concerning midterm inspections for certified vessels (*see* 46 U.S.C. 3308(1)). These vessels are the JANE FRANK (DEC Lic. # 0-0451); the BUNKER NEW YORK (DEC Lic. # 0-0731); the PRINCESS B. (DEC Lic. # 0-0747); the PETER FRANK (DEC Lic. # 0-0749); and the ANNIE B. (DEC Lic. # 0-0750). *See* collective Appendix 15.

18. None of the five vessels referred to in the preceding paragraph has demonstrated to the Coast Guard that it has performed the required midterm inspection. Therefore, the current condition of these vessels is not documented according to Coast Guard Standards, and the vessels are currently violating federal requirements.

19. While no vessel can legally operate without a Coast Guard midterm inspection, several of the vessels referred to in the two preceding paragraphs have demonstrated a pattern of operating violations requiring especially close attention to inspection requirements. Most seriously, the PETER FRANK

experienced an accidental petroleum explosion in 1980, while it was uncertified, causing loss of a crew member's life. *See* collective Appendix 16. The BUNKER NEW YORK was issued numerous Coast Guard notices of operational non-compliance during 1987 and 1988 (*id.*); similarly, the Coast Guard found in 1986 that the JANE FRANK had several significant operating violations (*id.*).

Respondents' Disregard of DEC and Coast Guard Authority

20. While the Coast Guard has not yet had the time to prosecute fully many of the recent violations cited above, it assessed over $67,000 in penalties in twenty one separate cases brought against respondents based on federal violations occurring between 1984 and 1987.

21. Among these violations for which the Coast Guard imposed penalties are illegal discharge of petroleum into navigable waters by, among others, the ANNIE BERMAN (September 2, 1984–Jamaica Bay, N.Y.); the RICHARD K. (DEC Lic. # 0-0727) (February 26, 1985–Port Washington Harbor); the SARAH FRANK (July 23, 1986–Kill Van Kull); the PRINCESS B. (October 10, 1986–Arthur Kill); and, the JANE FRANK (November 28, 1986–Harlem River, and December 22, 1986–Hudson River). Copies of the applicable Coast Guard letters of assessment and Guard Commandant's denial of appeals are annexed as Appendix 17.

22. Respondents never notified DEC as to the existence of such spills, as they are required to do under NL Section 175 and 6 NYCRR Section 613.8. This failure is critical, as it hampers DEC's spill response and may lead to delays at a key stage of cleanup efforts.

23. As an example, on February 16, 1990, the motorized vessel TUG EVELYN sank at the First Marine Shipyard, spilling approximately 5,000 gallons of diesel fuel, presaging the larger spill to come in the case of the SARAH FRANK. The TUG EVELYN spill was never reported to the Coast

Guard or DEC, and was only discovered when federal investigators happened to inspect the First Marine Shipyard property in connection with an unrelated spill. This delay in notification caused a significant response delay, resulting in irreparable damage to the marine environment.

24. DEC brought administrative proceedings against First Marine Shipyard based on the illegal petroleum discharge and notification failure referred to in the proceeding paragraph. First Marine was later found by the Criminal Court of the City of New York to have violated such notice requirements and ordered to pay a $2,500 fine. *See* Appendix 18.

25. Returning to the pattern of operating violations involving the subject vessels: the Coast Guard also assessed penalties against respondents and their related corporate entities for more than twenty five different equipment failures, personnel deficiencies, record keeping errors and other violations of operating requirements designed to maintain the necessary standard of care. A list of these violations is annexed as Appendix 19.

26. Not only have respondents and their related business entities engaged in the long course of illegal conduct indicated by these violations and penalties, they have also illegally refused to pay the $67,000 in penalties involved. This latter refusal has required the Coast Guard to seek judicial intervention to collect these penalties. *See U.S.A. v. Standard Marine Transport Services, Inc., et al.* (U.S. District Court, S.D.N.Y., Complaint filed on or about August 30, 1990).

Respondents' Admitted Criminal Mishandling of Sewage & Wastewater

27. In 1989, General, Berman, Standard and Evelyn Frank, among others, were named in a twenty four count indictment (SGJ223-89-06(2)) handed down by the New Jersey State Grand Jury. The charges stemmed from the New Jersey State Attorney General's investigation of apparently illegal sewage

and wastewater dumping in New York and New Jersey waters by barges belonging to the corporate respondents in this proceeding.

28. Those named in the New Jersey indictment were said to have contracted to haul wastewater and digested sewage sludge generated in the bi-state area to treatment facilities or legal ocean dumping grounds some 106 miles off shore. Instead, General, Berman, Standard and Evelyn Frank allegedly dumped such cargoes, as a matter of course, into waters directly adjacent to land, such as the Kill Van Kull, Newark Bay, New York Harbor, *etc.* In several cases, the barge involved was alleged to have dumped its pollutant load without even leaving the area where it was docked!

29. General and Evelyn Berman recently signed an agreement (*see* Appendix 20) to plead guilty to the first and fourteenth count of the indictment, respectively (those relevant portions of the Indictment are annexed as Appendix 21). Thus, General admitted committing at least eighteen acts of illegal wastewater disposal in and around the New York Bight during 1987 and 1988 alone, to the severe detriment of the marine resources involved. Among the vessels from which such wastes were discharged were the LEO FRANK, the PRINCESS B, the CYNTHIA M. and the MORRIS J. BERMAN.

30. Evelyn Frank, General's Chief Executive Officer, pleaded guilty to one count of purposely and knowingly causing the unlawful discharge of hazardous wastes and toxic pollutants into the waters of Newark Bay, on or about December 10, 1988. *Id.*

31. As a final matter, the Civil Division of the New Jersey Attorney General's office recently obtained an injunction based on the illegal conduct of Standard Tank Cleaning Corporation, a company affiliated with those named herein through common ownership and control. Standard Tank Cleaning Corporation's business activities include cleaning

the holds of the barges referred to in this order, and discharging the wastewater byproduct of these operations into the receiving waters of the Kill Van Kull.

32. In a bench decision rendered on August 1, 1990, the New Jersey Superior Court found that Standard Tank's wastewater discharges violated the terms of its State discharge permits on 137 different occasions between May 1988 and April 1990. The Court then enjoined the corporation from committing such violations in the future. *See State of New Jersey Department of Environmental Protection v. Standard Tank Cleaning Corporation*, N.J. Super. Ct., Chancery Division - Hudson County (Slip Opinion 8/1/90).

33. Given the unbroken chain of environmental harms respondents have caused, their repeated oil spills and general disregard for the marine environment in which they function, the lack of adequate inspections for the vast majority of respondents' fleet, their failure to report oil spills to DEC at critical times, and their unending stream of citations by the Coast Guard for operating deficiencies, continued operation of this fleet in New York waters is likely to result in additional unreported oil, toxic wastewater or sewage sludge discharges such as those referred to above, which would irreversibly or irreparably damage the natural resources of the marine district.

34. These same facts and circumstances are likely to cause other petroleum-related explosions, constituting an imminent danger to the health and welfare of vessel crews and others who find themselves on the waters of the marine district, and rendering additional irreparable environmental harm likely.

* * * *

CONCLUSIONS

1. Respondents' barge hauling operations are tainted by a pervasive and unabated pattern of illegal conduct, which

extends to criminal mishandling of waste materials, wholesale operation of uncertified barges, disregard of Coast Guard enforcement orders including refusal to pay penalties levied therein, failure to license barges with DEC or report oil spills at critical junctures, and knowing misrepresentations and concealments of material facts in licensing proceedings before DEC.

2. Due to Respondents' disregard for environmental and admiralty laws, their barge hauling activities have been responsible for two petroleum explosions incidents involving loss of life and one other involving serious injury. These activities have also resulted in over ten recent oil spills—two this year alone including the loss of roughly 50,000 gallons or more from the SARAH FRANK, as well as the flagrant and knowing discharge of millions of gallons of toxic sludge and wastewater into the New York and New Jersey marine districts.

3. Based on the foregoing, continued operation of this fleet in New York waters is likely to result in additional unreported oil, toxic wastewater, or sewage sludge discharges such as those referred to above, which would irreversibly or irreparably damage the natural resources of the marine district. These same facts and circumstances are likely to cause other petroleum-related explosions, constituting an imminent danger to the health and welfare of vessel crews and others who find themselves on the waters of the marine district, and rendering additional irreparable environmental harm likely.

* * * *

NOW, THEREFORE, IT IS ORDERED THAT:

I. The licenses issued by DEC to the barges listed by number in Appendix 1 are hereby suspended, and will be subject to revocation if DEC staff meets its burden of proof, pursuant to 6 NYCRR 621.14, at the hearing scheduled in paragrapn V, below. This order shall constitute notice of intent to revoke, pursuant to 17 NYCRR Section 30.10.

II. Within seven days of the date this order is signed, respondents shall, in a legal and authorized manner, remove, store and/or dispose of all materials contained within any cargo holds, tanks or storage areas aboard the barges listed in Appendix A.

III. Once the barges listed in Appendix 1 have been emptied of product, they shall remain docked and shall not be operated in the New York Marine District.

IV. Respondents shall certify to DEC in writing that they have complied with the requirements of this order within 14 days of its date.

V. Respondents shall have the opportunity to be heard, pursuant to 6 NYCRR Section 620.3 and 17 NYCRR Section 30.10. Notice is hereby given that DEC will conduct a hearing for this purpose at its Region II Office, 47-40 21st Street, Long Island City, N.Y. 11101 on October 30, 1990, at 10 am.

VI. All communications to DEC pertaining to this Order shall be addressed to:

New York State Department of
Environmental Conservation
47-40 21st Street
Long Island City, N.Y. 11101
Att: Paul A. Gallay, Esq.
(tel. 718-482-4965)

Dated: Long Island City, N.Y.
October 18, 1990

Thomas C. Jorling
Commissioner, New York State
Department of Envir. Conserv.

To: Service list attached

APPENDIX B

DECISION AND ORDER
R2-3291-90-11

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the alleged Violations of Article 17 of the New York State Department of Environmental Conservation Law ("ECL"), Article 12 of the New York State Navigation Law ("NL"), and Title 6 and 17 of the New York Codes, Rules and Regulations ("NYCRR") by:

Berman Enterprises, Inc.
555 Madison Avenue
New York, New York 10022

General Marine Transport Corporation

—and—

Standard Marine Services, Inc.
1 Ingham Avenue
Bayonne, New Jersey 07002

Jane Frank Kresch, as Secretary of Berman Enterprises

Evelyn Berman Frank, as Chief Executive Officer of General Marine Transport Corp. and an officer of the other named Corporations, and

Peter Frank, as President of General Marine Transport Corporation

Respondents.

The issue presented in this case with respect to the summary abatement relief is one that has not been previously addressed. Simply stated, the question is whether the summary abatement threshold is reached because of the alleged problems with the management Respondents exercise over the vessels that are the subject of this action as demonstrated by the history of past compliance problems and other incidents that have resulted in adverse environmental impacts in the New York harbor area. It is worth noting however that issues addressing the compliance history and suitability of other persons subject to the Department's jurisdiction have been addressed in prior Department proceeding albeit in different procedural contexts.

Review of the Applicable Law

The summary abatement statute (ECL § 71-0301) requires a finding that there is a condition or activity which presents an imminent danger to the health or welfare of the people of the State or results in or is likely to result in irreversible or irreparable damage to natural resources, and relates to the prevention and abatement powers of the Commissioner. In this instance, given the broad powers of the Commissioner to prevent water pollution, and to protect wildlife and coastal resources (see ECL Articles 3, 11, 13, 15, 17, 25, 34, 71) there can be no doubt that the matters at issue relate to his prevention and abatement. The only question therefore, is whether the complained of condition or activity meets the other requirements of the statute.

The summary abatement provision of the ECL is mandated by the provisions of the Clean Air Act which require states to include as part of any approvable state implementation plan, authority comparable to 42 USC §-7603 (see 42 USC § 7410(a)(2)(F)(v) and McKinney's Consolidated Laws, ECL § 71-0301 Practice Commentaries). The Clean Air Act provision provides authority for, among other things, the use of injunctive relief where sources of pollution are presenting imminent and substantial endangerment to the health of per-

sons (42 USC § 7603). Since the adoption of this provision in the Clean Air Act, other federal environmental statutes that have been adopted contain similar emergency provisions and extend the availability of such relief beyond situations where public health is involved to instances where the endangerment is to the environment or public welfare (33 USC § 1364, Federal Water Pollution Control Act; 42 USC § 6973, Resource Conservation and Recovery Act; 42 USC § 9606, Comprehensive Environmental Response and Compensation Act). Furthermore, I note that the term "public welfare" has been held to be exceptionally broad, encompassing health and safety, recreational, aesthetic environmental and economic interests (*City of El Paso v. Reynolds*, 597 F. Supp. 691,700 (D.N.M. 1984)).

All of these emergency provisions have the common element of requiring a showing of imminent and substantial endangerment. While the summary abatement provision of the ECL does not have a well developed body of case law associated with it, the federal statute on which it is based and other comparable federal statutes have developed such a body of case law. This case law directly addresses the issue of what is required for a showing of imminent and substantial endangerment and therefore is appropriately relied upon in this Decision.

It is a well established principle that the use of the term "endangerment" in the above referenced federal statutes (or the comparable use of the term "danger" in ECL § 71-0301) is not restricted to situations where an actual harm exists but encompasses threatened or potential harms (*Reserve Mining Company v. Environmental Protection Agency*, 514 F.2d 492, 528 (8th Cir. 1975)). Because endangerments entails only a threat of harm, these provisions have been applied where there is only a risk of harm, (*United States v. Price*, 688 F.2d 204, 211 (3d Cir. 1982)). It has also been held that it is not necessary to quantify the harm or risk of harm (*U.S. v. Conservation Chemical Co.*, 24 ERC 1008 (W.D. Mo. 1985)).

By way of examining the question of what constitutes "imminence", the Courts have opined that the danger need not be immediate (*United States v. Waste Industries*, 734 F.2d 159, 165 (4th Cir. 1984); *United States v. Reilly Tar and Chemical Corp.*, 546 F. Supp. 1100 (D.Minn. 1982)). It has been held that an endangerment is "imminent" if factors giving rise to it are present, even though the harm may not be realized for years (*U.S. v. Conservation Chemical Co., supra* at 1030).

Whenever the courts have interpreted these statutes, they have acknowledged the need to factor into the decision both the nature of the endangerment which may be presented and its likelihood, recognizing that risk may be "assessed from suspected, but not completely substantiated relationships between facts, from trends among facts, from theoretical projections, from imperfect data, or from probative preliminary data not yet certifiable as fact", (*United States v. Vertac Chemical Corp.*, 489 F. Supp. 870, 885 (E.D. Ark., W.D. 1980), citing *Ethyl Chemical Corporation v. Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir. 1976)). However, in recognition of the intent of these statutes to protect human health and the environment, the courts have recognized the need to liberally construe them in order to accomplish and maximize their benefits (*U.S. v. Conservation Chemical Co., supra* at 1029). And finally, the courts have emphasized the need to err in favor of protecting the public health, welfare and the environment when making any determination thereunder (*Id.* at 1031). To some extent this philosophy has been codified into the regulations governing the summary abatement provision which place the burden of proof on the responding party to prove that the complained of condition or activity does not come within the provisions of the statute (6 NYCRR 620.3(b)).

Review of the Facts

The record reveals that Respondents operate roughly thirty vessels in the New York Harbor area. These vessels include

oil barges, sludge barges and tugs. While there are a number of corporations that are involved in the ownership and operation of these vessels, there is substantial evidence in the record which demonstrates that the corporations are acting under the common management of the Berman and Frank families. In fact, Respondent's witness Sommers referred to all of the vessels as being, "under the care of Berman industries." Further Respondents have not sought to draw any distinctions between the management for any of the vessels that are the subject of the Summary Abatement Order.

Over the past eleven years, these vessels have compiled records of chronic non-compliance with state and federal regulations which are designed to protect the environment, public health and safety. As discussed further in the Hearing Report, while preclusionary effect has not been given to the various citations from the Coast Guard, these citations have been treated as relevant evidence concerning the circumstances of these events. It is the Respondents' failure to present any evidence which contradicts the citations concerning these incidents that compels the finding that they are indeed responsible for the offenses that were charged.

Many of the violations have been relatively minor and have involved record keeping or administrative requirements. Others have been more significant and have gone directly to the ability of the vessel to operate safely. Some have been accompanied by serious injury or loss of life or environmental damage. In still other circumstances, there were incidents documented which resulted in the pollution of New York harbor although no violation of law was cited.

Some of the violations and pollution incidents were shown to be the direct result of a failure to properly manage the vessels for which Respondent are directly responsible. The Respondents also bear responsibility for incidents attributable to the negligent acts of their employees on the well established legal doctrine of *respondent superior*. Under this doctrine the Respondents are responsible for the acts of their employees regardless of whether those acts were negligent so

long as the employee was acting the scope of his or her employment (52 NY Jur. 2d, Employment Relations § 334). While the record does not reflect a cause for all the alleged violations or pollution incidents, I note that there are no incidents that are fully explained by acts of God or other circumstances where the happening was affirmatively shown to be beyond the reasonable control of the Respondents. The sheer number of violations and pollution incidents and their duration for over a period of eleven years is also itself noteworthy.

Despite all of the problems that Respondents have had with the operation of their vessels over the last eleven years, the record contains no information on any efforts they undertook to implement programs of preventive maintenance or inspections, improve management or otherwise address the cause of these problems. Nor is there any explanation as to why the Respondents experienced such difficulty in complying with the Coast Guard's safety regulations, compliance with which must be considered presumptively as reasonably achievable.

Based on this record, I can only conclude that the continued operation of these vessels by the Respondents carries with it a substantial risk that these and other incidents will reoccur. The nature of the business Respondents are engaged in and a simple survey of the incidents caused by the operation of their vessels in the past demonstrate the potential for creating serious environmental and safety hazards. There is no confidence that the continuation of the pattern of conduct exhibited by Respondents will not result in the recurrence of prior problems and perhaps in even more serious incidents. While Respondents indicate that they are prepared to improve the performance of their operation by accepting the recommendations of their consultant, the fact that their operation has not improved, and, in fact, has worsened over the past eleven years suggests that it would be imprudent to place any faith in such a promise.

Respondents argue that we are required to ignore their prior course of conduct in reaching conclusions on the likelihood of

continued transgressions in the future. The authority they cite for this proposition is flawed however. While there may be limitations on the reliance on habitual conduct or a prior course of conduct to prove the occurrence of a particular act, the staff is not trying to prove particular acts but rather the likelihood that Respondents' conduct will create a threat to the public health or welfare or the environment in the future. For that purpose prior conduct is not merely an allowable indicator, it is one of the best and even those cases cited by Respondents acknowledge the appropriateness of the use of such information for these purposes (*Halloran v. Virginia Chemicals, Inc.*, 41 N.Y. 2d 386 (1977)).

Respondents also argue that the State should defer to determinations of the Coast Guard which is the chief regulatory agency involved in marine safety. The Respondents fail to understand, however, that the Staff have not taken issue with the Coast Guard determinations concerning the seaworthiness of any of their vessels. Even seaworthy vessels represent an unacceptable risk when those in charge of their operation fail to follow regulations designed to protect health, safety and the environment.

Conclusion on Summary Abatement Issue

Marshaling the facts in the context of the law demonstrates that there is a sound basis for continuing the Order. Respondent bear the burden of proof and they have not even approached demonstrating that operation of their fleet of barges would not constitute an imminent danger to public welfare.

The evidence shows conclusively that the continued operation of the fleet of vessels by these Respondents carries with it a serious risk of harm. That harm is imminent as the factors given rise to the harm, *i.e.*, the type of management afforded by the Respondents, is now present. The harm itself is potentially quite serious, witness prior incidents where crewmen were killed and where the sinking of Respondents vessels

caused substantial oil spills in the highly sensitive environment of New York harbor.

The forced retirement of Evelyn Berman does not alter these conclusions at all. While she may have been chiefly responsible for the short dumping of sewage sludge, the problems that have plagued Respondents vessels go far beyond that incident. As discussed above and in the Hearing Report, this array of problems cannot be attributed to any one individual or company but is a function of management of the these [*sic*] Respondents and the Berman and Frank business enterprise more generally.

Proposed Modification

Staff have agreed by letter to modify the original order in order to allow certain of the sludge barges to operate. They apparently are convinced that these barges are needed to support a disposal effort from several New Jersey communities and that the consequences of the failure to operate the barges exceeds the risk posed by their operation under current management. Additionally, Respondents argue that the continued operation of their sludge barges is also justified since those barges are under additional stringent regulatory controls imposed by the Coast Guard.

It should be noted that, unless there is an specific delegation, Staff has no authority to modify a summary abatement order of the Commissioner (*In the Matter of Allegro Oil and Gas*, Decision and Order of the Commissioner, October 20, 1988). In the context of this proceeding, the action is therefore being treated as a request to modify the Order.

While the circumstances cited by the Staff might support a public policy decision to allow the sludge barges to continue to operate, the record would need to demonstrate that there was no reasonable alternative to the use of Respondents barges. This record does not make a sufficient showing on this point. Respondents argument in support of the modification is specifically rejected since any regulatory controls, regardless of how foolproof they may appear, may be under-

mined through the type of management exhibited by the Respondents.

While as a practical matter it is recognized that the time period during which the barges were to be allowed to operate has expired, should circumstances change, an application to reinstitute the operating authority of the barges would be reconsidered upon a showing that the disposal authorities in New Jersey have no reasonable alternative.

I also note that another exception was made on the basis of public need for the operation of the Jane Frank. I find, similarly, that this record does not demonstrate that the use of this barge was the only available alternative under these circumstances.

License Revocation

Given the determination to maintain the summary abatement order in effect into the indefinite future, the issue of whether to revoke Respondent Berman Enterprises, major facility licenses may be rendered moot. However, for completeness' sake the following discussion is included.

The regulations promulgated under the Navigation Law contain limited grounds for revoking licenses (17 NYCRR 30.10(b)). The Staff requests revocation on the basis that the Respondents have not complied with the terms of their licenses. They further maintain that there are additional grounds to revoke these licenses based upon the circumstances offered as justification for the summary abatement order, *i.e.*, that the prior history associated with the Respondents demonstrates that they cannot reliably operate the licensed vessels. This latter ground is not explicitly stated in the Navigation Law and its implementing regulations.

The controversy surrounding the first ground relates to whether the Respondents reported those changes to their vessels design, construction, operation or maintenance which would materially affect the potential for a petroleum discharge (17 NYCRR 30.6(c)(3)).

The failure to report as relates to certain vessels was adequately established on the record. The general condition of the license clearly requires the reporting of vessels that sink (the Sarah Frank and the Princess B), suffer significant structural damage (the Jodie K) and have serious maintenance deficiencies (tne Nathan B). I do not find, however, that the general condition unambiguously requires reporting of any order or citation of the Coast Guard *per se*. This is particularly true where the order or citation arises out of the failure to comply with an administrative requirement (*e.g.*, failure to have had an inspection) which is not associated with a change in design, construction or operation and maintenance of the vessel itself.

The revocation of these licenses on the second and alternative ground cited by Staff is, however, adequately justified. The Department has previously held that in issuing licenses under the ECL, there is implicit authority to consider a person's past compliance history and general fitness of the applicant (*In the Matter of American Transfer Company*, Interim Decision of the Commissioner, February 4, 1991). We have also held that there is no basis, either in law or public policy, to distinguish between criteria used to grant a permit and criteria used to revoke a permit (*Id.*). If, subsequent to the issuance of a license, information unavailable at the time of the license issuance demonstrates that the licensee no longer meets the licensing criteria, there is authority to revoke the license. Such is the case here.

Although there were significant problems with Respondents' operation prior to the issuance of the most recent licenses, the compliance problems which Respondents have had since then, as detailed in the Hearing Report, demonstrate convincingly that their continued operation of the barges represents a menace to the New York harbor environment. These problems when added to and taken in the context of prior compliance problems are significant enough to now warrant revisiting and revising the decision to issue their major facility licenses.

NOW THEREFORE HAVING CONSIDERED

I. The Summary Abatement Order dated October 18, 1990 is hereby confirmed in whole and extended.

II. No modification to such Order is granted.

III. The revocation of the major facility licenses granted to Respondents set for [*sic*] in the Order of October 18, 1990 is confirmed.

IV. Staff are delegated the authority to modify this order upon the showing set forth above in this Decision.

V. All communications between Respondents and the Department concerning this Order shall be made to the Department's Region 2 Director, 47-40 21st Street, Long Island City, New York 11101.

VI. The provisions, terms and conditions of the Order shall bind Respondents, their agents, servants, employees, successors and assigns, and all persons, firms and corporations acting for or on behalf of the Respondents.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
LANGDON MARSH, EXECUTIVE
DEPUTY COMMISSIONER

Dated: Albany, New York
March 25, 1991

TO: Berman Enterprises, Inc.
555 Madison Avenue
New York, New York 10022

General Marine Transport Corporation &
Standard Marine Services, Inc.
1 Ingham Avenue
Bayonne, New Jersey 07002

APPENDIX C

NAVIGATION LAW

§ 174. Licenses

1. No person shall operate or cause to be operated a major facility as defined in this article without (a) a license issued by the commissioner, (b) without paying a license fee if such fee is required by the administrator, pursuant to the provisions of paragraph (a) of subdivision four of this section, and (c) without paying the surcharge established by paragraph (b) of subdivision four of this section.

2. Licenses shall be issued on an annual basis and shall expire on March thirty-first annually, subject to such terms and conditions as the department may determine are necessary to carry out the purposes of this article.

3. As a condition precedent to the issuance or renewal of a license the department shall require satisfactory evidence that the applicant has implemented or is in the process of implementing state and federal plans and regulations for control of discharges of petroleum, and the containment and removal thereof when a discharge occurs.

4. (a) The license fee shall be one cent per barrel transferred until the balance in such account established by paragraph (a) of subdivision two of section one hundred seventy-nine of this article equals or exceeds twenty-five million dollars, provided, however, that the fee on any barrel, including any products derived therefrom, subject to multiple transfer, shall be imposed only once at the point of first transfer. In each fiscal year following any year in which the balance of such account equals or exceeds twenty-five millon dollars, no license fee shall be imposed unless (a) the current balance in such account is less than twenty million dollars or (b) pending claims against such account exceed fifty percent of the existing balance of such account. The provisions of the

foregoing notwithstanding, should claims paid from such account not exceed five million dollars within three years after the license fee is first imposed, the license fee shall be one cent per barrel transferred until the balance in such account equals or exceeds eighteen million dollars, and thereafter shall not be imposed unless: (1) the current balance in such account is less than fifteen million dollars or (2) pending claims against such account exceed fifty percent of the existing balance of such account. In the event of either such occurrence and upon certification thereof by the state comptroller, the administrator shall within ten days of the date of such certification reimpose the license fee, which shall take effect on the first day of the month following such relevy. In the event of a major discharge or series of discharges resulting in claims against such account exceeding the existing balance of such account, the license fee shall be imposed at the rate of four cents per barrel transferred until the balance in such account equals pending claims against such account; provided, however, that the rate may be set at less than four cents per barrel transferred if the administrator determines that the revenue produced by such lower rate shall be sufficient to pay outstanding claims against such account within one year of such imposition of the license fee. Should such account exceed eighteen million dollars or twenty-five million dollars, as herein provided, as a result of interest, the administrator and the commissioner of environmental conservation shall report to the legislature and the governor concerning the options for the use of such interest.

(b) The surcharge on the license fee shall be two and one-half cents per barrel for each barrel transferred on or after June first, nineteen hundred eighty-five but before February first, nineteen hundred eighty-eight. Such surcharge shall be three and one-half cents per barrel for each barrel transferred on or after February first, nineteen hundred eighty-eight, but before February first, nineteen hundred ninety. Such surcharge shall be four and one-quarter cents per barrel for each

barrel transferred on or after February first, nineteen hundred ninety.

(c) The surcharge established by paragraph (b) of this subdivision shall continue to be paid despite the fact that the license fee imposed pursuant to paragraph (a) of this subdivision may, pursuant to said paragraph, no longer be imposed.

5. Every licensee shall on or before the twentieth day of the month following the close of each license fee period certify to the commissioner on such forms as may be prescribed by the commissioner the number of barrels of petroleum transferred to the licensee's major facility during the license fee period and at the same time shall pay the full amount of the license fee and surcharge due except that no licensee shall be required to make such payment until the cumulative amount due equals or exceeds one hundred dollars. Any licensee whose cumulative license fee or surcharge does not equal or exceed one hundred dollars annually shall pay the total amount due on or before the twentieth day following the expiration date of the license issued pursuant to this section.

6. If a certificate required by this section is not filed, or if a certificate when filed is incorrect or insufficient in the opinion of the commissioner, the amount of license fee or surcharge due shall be determined by the commissioner from such information as may be available. Notice of such determination, and notice of licensee's right to appeal such determination, shall be given to the licensee liable for the payment of the license fee or surcharge. Such determination shall finally and irrevocably fix the fee or surcharge unless the person against whom it is assessed, within thirty days after receiving notice of such determination, shall apply to the commissioner for a hearing, or unless the commissioner on his own motion shall redetermine the same. After such hearing the commissioner shall give notice of his determination to the person to whom the license fee or surcharge is assessed.

7. Any licensee failing to file a certificate, failing to pay a license fee or surcharge, or filing or causing to be filed, a certificate which is willfully false, or failing to keep any records required by this article or rules and regulations adopted hereunder, shall, in addition to any other penalties herein or otherwise provided, be subject to a fine not to exceed two times the annual license fee or surcharge, as determined by the commissioner.

8. Within three months of the effective date of this article every owner or operator of a major facility shall obtain a license. The department shall issue a license upon the showing that such registrant can provide necessary equipment to prevent, contain and remove discharges of petroleum.

9. On or after a date to be determined by the commissioner, but in no case later than ninety days after the effective date of this article, no person shall operate or cause to be operated any major facility without a major facility license issued by the commissioner. No license shall be valid for more than one year. Each applicant for a major facility license shall submit information, in a form satisfactory to the commissioner, describing the following:

(a) The number of barrels or another measurement of the storage capacity of the facility;

(b) Average daily throughput of the facility;

(c) A primary and contingency cleanup and removal plan which includes, but is not limited to, an inventory of:

(i) The storage and transfer capacity of the facility;

(ii) The containment and removal equipment, including, but not limited to, vehicles, vessels, pumps, skimmers, booms, chemicals, and communication devices to which the facility has access through direct ownership or by contract or membership in a discharge cleanup organization recognized

by the departments of environmental conservation and transportation as well as the time lapse following a discharge which precedes such access;

(iii) The trained personnel which are required and available to operate such containment and removal equipment and the time lapse following a discharge which precedes such availability;

(iv) All equipment and trained personnel used or employed in a capacity at the facility to prevent discharges of petroleum;

(v) The terms of agreement and operation plan of any discharge cleanup organization to which the owner or operator of the facility belongs;

(vi) The type and amount of petroleum transferred, refined, processed or stored at the facility;

(d) The steps taken to insure prevention of a discharge;

10. No portion of fees or surcharges assessed and collected pursuant to this section shall be used for any purpose if such use, under federal law, would preclude the collection of such fee or surcharge.

11. Each owner or operator of a major facility or vessel subject to the provisions of this article shall designate a person in the state as his legal agent for service of process under this section and such designation shall be filed with the secretary of state. In the absence of such designation the secretary of state shall be the designated agent for purposes of service of process under this section.

APPENDIX D

17 N.Y.C.R.R. § 30.10

30.10 Fines and revocation of license. (a) Any licensee which willfully refuses to file a monthly report, or to pay a licensee fee and/or additional fee after a determination by the commissioner, or files a monthly report which is willfully false or willfully fails to keep the records required by this Part, may be subject to a fine, not to exceed two times the annual license fee, as determined by the commissioner.

(b) Any license to operate a major facility may be revoked by the commissioner where the licensee has failed to comply with the terms of the license or any special conditions or requirements contained therein.

(c) The determination of whether a fine should be assessed and the amount thereof, or whether a license should be revoked, shall only be made by the commissioner after a hearing before a hearing officer appointed by the commissioner which is conducted in accordance with the provisions of the State Administrative Procedure Act.